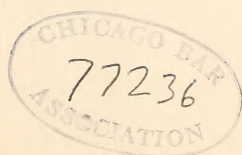


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BOUND.....NOV 8 '60.....

36629

PETRI VALAUSKIS,
Appellee,

vs.

THE CRANE AND MORRELAND REAL ESTATE
IMPROVEMENT CO., a Corporation, et al.,
Defendants.

8/60
25
Filed alone March 22, 1933.

INTERLOCUTORY APPEAL
FROM CIRCUIT COURT
OF COOK COUNTY.

On Appeal of
STOCK YARDS TRUST & SAVINGS BANK, a
Corporation, as Successor-Trustee,
PEOPLE'S NATIONAL BANK AND TRUST
COMPANY OF CHICAGO, a Corporation, as
Trustee under Document No. 9851177,
W. W. PEARSON, as Receiver of People's
National Bank and Trust Company of
Chicago, and W. W. PEARSON, FRANK J.
O'BRIEN, E. R. ELMSTROM, J. C. VLASAK
and H. G. LAYCOCK, as the Committee for
the Protection of the Holders of Bonds
secured by Trust Deed, Document No. 9851177,
Appellants.

270 I.A. 611

MR. PRESIDING JUSTICE McSURELY
DELIVERED THE OPINION OF THE COURT.

This is an appeal from an interlocutory order appointing a receiver under a bill to foreclose a trust deed. Petri Valauskis, hereafter called complainant, who filed the bill, is the holder of a \$1000 bond out of a total issue of 216 bonds aggregating \$175,000; the appellants are the Stock Yards Trust & Savings Bank, a corporation, as successor-trustee of the trust deed, the original trustee and its receiver, and the members of the committee for the protection of the bondholders secured by the trust deed.

These appellants challenge the appointment of the receiver, saying that complainant under the terms of the trust deed had no right to file a bill to foreclose; that such right is exclusively vested in the trustee or successor-trustee. Complainant says that she has the right to proceed independently because of the failure of the trustee to function and the non-appointment of a successor

NOV 8 '09

10/10

Filed alone March 22, 1933.

36622

PETRI VALUABLES, Appellee,

vs.

THE CHASE AND MORRIS REAL ESTATE IMPROVEMENT CO., a Corporation, et al., Defendants.

INTERCOURT APPEAL FROM CIRCUIT COURT OF COOK COUNTY.

270 I.A. 611

On Appeal of STOCK YARDS TRUST & SAVINGS BANK, a Corporation, as Successor-Trustee, PEOPLE'S NATIONAL BANK AND TRUST COMPANY OF CHICAGO, a Corporation, as Trustee under Document No. 988177, E. W. PEARSON, as Receiver of People's National Bank and Trust Company of Chicago, and W. W. PEARSON, TRUSTEES, O'BRIEN, E. R. KIMSTON, J. O. ALABAR and M. C. LAYCOCK, as the Committee for the Protection of the Holders of Bonds secured by Trust Deed, Document No. 988177, Appellants.

MR. PRESIDING JUSTICE MAJORITY DELIVERED THE OPINION OF THE COURT.

This is an appeal from an interlocutory order appointing a receiver under a bill to foreclose a trust deed. Petri Valuable, hereafter called complainant, who filed the bill, is the holder of a \$1000 bond out of a total issue of \$10 bonds aggregating \$10,000; the appellants are the Stock Yards Trust & Savings Bank, a corporation, as successor-trustee of the trust deed, the original trustee and its receiver, and the members of the committee for the protection of the bondholders secured by the trust deed. These appellants challenge the appointment of the receiver, saying that complainant under the terms of the trust deed had no right to file a bill to foreclose; that such right is exclusively vested in the trustee or successor-trustee. Complainant says that she has the right to proceed independently because of the failure of the trustee to function and the non-appointment of a successor

in trust, under which circumstances, by the terms of the trust deed she had the right to file her bill.

To get the entire picture it is necessary to note various proceedings in their order. November 9, 1932, complainant filed her bill; November 17th a demurrer to this bill was filed which, among other things, asserted the exclusive right of action in the trustee; this demurrer, apparently, is still pending; November 21st the Stock Yards Trust & Savings Bank as successor-trustee filed its bill to foreclose; December 3rd complainant made a motion for the appointment of a receiver under her bill, which motion was continued to December 6th; on December 6th the successor-trustee moved for leave to file an intervening petition in answer to the motion of complainant for a receiver and objecting thereto; the motion to file this petition, together with the motion for appointment of a receiver, was set down for hearing on December 9th; December 14th this hearing was continued to December 20th; December 19th the successor-trustee served notice that it would on December 20th move for the appointment of a receiver under its bill. These various motions were finally heard on December 30, 1932, and culminated in the entry of four orders: (1) The court ordered the consolidation of the two bills nunc pro tunc as of December 19, 1932; (2) A receiver was appointed in pursuance of the motion made by complainant Valauskis; (3) Leave was given to the successor-trustee to file its intervening petition in the proceeding in which the Valauskis bill was filed, nunc pro tunc as of December 19, 1932; and (4) on December 31st an order was entered nunc pro tunc as of December 19th, denying the prayer of the intervening petitioner which had objected to Valauskis' motion for a receiver.

The right to file a bill to foreclose is limited by article 11 of the trust deed, as follows:

Filed March 22, 1932

in trust, under which circumstances, by the terms of the trust deed she had the right to file her bill.

To get the entire picture it is necessary to note various proceedings in court order. November 9, 1932, complaint filed her bill; November 14th a demurrer to this bill was filed which, among other things, asserted the exclusive right of action in the trustee; this demurrer, apparently, is still pending; November 21st the Green Yards Trust & Savings Bank as successor-trustee filed its bill to foreclose; December 2nd complaint made a motion for the appointment of a receiver under her bill, which motion was continued to December 8th; on December 8th the successor-trustee moved for leave to file an intervening petition in answer to the motion of complaint for a receiver and objecting thereto; the motion to file this petition, together with the motion for appointment of a receiver, was set down for hearing on December 9th; December 14th this hearing was continued to December 20th; December 18th the successor-trustee served notice that it would on December 20th move for the appointment of a receiver under its bill. These various motions were finally heard on December 30, 1932, and culminated in the entry of four orders: (1) The court ordered the consolidation of the two bills here v. land as of December 18, 1932; (2) A receiver was appointed in pursuance of the motion made by complaint Valaukis; (3) Leave was given to the successor-trustee to file its intervening petition in the proceeding in which the Valaukis bill was filed, here v. land as of December 18, 1932; and (4) on December 21st an order was entered here v. land as of December 18th, denying the prayer of the intervening petitioner which had objected to Valaukis' motion for a receiver. The right to file a bill to foreclose is limited by article 11 of the trust deed, as follows:

"The exclusive right of action hereunder shall be vested in said Trustee until refusal on its part to act, and no bondholder shall be entitled to enforce these presents in any proceeding in law or in equity until after demand has been made upon the Trustee accompanied by tender of indemnity as aforesaid, and said Trustee has refused to act in accordance with such demand. Said Trustee shall not be bound to recognize any person as a bondholder until his bonds have been deposited with said Trustee, and until his title thereto has been satisfactorily established."

It has been uniformly held by this court that under such provisions no individual bondholder is entitled to file a bill to foreclose except under the specified conditions. Rosenzweig v. Reitzman, 266 Ill. App. 124; Reliance Bank & Trust Co. v. Dalsey, 263 Ill. App. 546; Pearlman & Co. v. Lincoln-Belmont Bldg. Corp. 251 Ill. App. 135. Complainant seems to concede this but argues that as her bill alleges the incapacity to act as trustee of the People's National Bank and Trust Company, the prior trustee, and as no successor-trustee had been appointed, complainant had the right to file the bill. The bill also alleged that the appointment of a new trustee to foreclose the trust deed is unnecessary, but complainant submits that question to the chancellor.

The trust deed, covering the appointment of a successor in trust, is as follows:

"The Trustee herein or its successors in trust may resign or discharge itself or themselves of and from the trust hereby created by resignation in writing filed in the Recorder's Office of said County, and in case of a vacancy in the office of Trustee or otherwise, a successor or successors may be appointed by the holder or holders of a majority of the bonds then outstanding by an instrument in writing duly signed and acknowledged by them, which said instrument shall be recorded in the office of the Recorder of Cook county, Illinois; or in case said holder or holders do not agree in the appointment of a new Trustee within thirty (30) days after such vacancy shall occur, then the holder or holders of any of said bonds may apply to the Circuit Court of Cook County for the appointment of a new Trustee or Trustees."

When complainant moved for the appointment of a receiver under her bill, the Stock Yards Trust & Savings Bank asked for leave to file an intervening petition in objection to complainant's motion for a receiver. This petition set forth that a receiver had

been appointed for the People's National Bank and Trust Company, the trustee, prior to the filing of the bill of complainant; that said receiver had resigned on behalf of said bank, as trustee, which resignation was recorded in the Recorder's Office of Cook County; that the holders of the majority of the bonds by an instrument in writing duly signed and acknowledged by them, and on November 7, 1932, recorded in the office of the Recorder of Cook county, Illinois, appointed the petitioner, Stock Yards Trust & Savings Bank, as successor-trustee to People's National Bank and Trust Company under the trust deed, which appointment had been accepted by the petitioner, and, that by reason of the terms of the trust deed the petitioner became invested with all the powers, rights, estates and interests of the original trustee; that the bill of complaint herein was not filed until November 9, 1932; that petitioner, as successor-trustee, is in possession of the real estate for which a receiver is sought and is collecting the rents, issues and profits for the benefit of all the bondholders, including the complainant; that the holder of one of the unpaid bonds secured by the trust deed declared the whole of the principal secured to be at once due and payable and requested petitioner to institute a suit for the foreclosure of the trust deed for the benefit of the holders of all the unpaid bonds, agreeing to indemnify petitioner from court costs and expenses; that on November 21, 1932, petitioner filed its bill of complaint for the foreclosure of the trust deed for the use and benefit of all the bondholders, and that said cause is entitled Stock Yards Trust & Savings Bank, a Corp., as Successor-Trustee v. The Crane & Moreland Real Estate Improvement Co., et al., in the Circuit Court of Cook County; exhibits were attached to the petition as follows: Resignation from the trust of the Receiver of People's National Bank and Trust Company; the appointment of the Stock Yards Trust & Savings Bank as Successor-Trustee, and its acceptance of

been appointed for the People's National Bank and Trust Company.

The trustee, prior to the filing of the bill of assignment, that

said receiver had resigned on behalf of said bank, as trustee,

which resignation was returned in the receiver's office at Cook

County; that the balance of the moneys of the bank by an instru-

ment in writing duly signed and acknowledged by them, and on November

27, 1903, recorded in the office of the recorder of Cook County,

Illinois, appointed the petitioner, Green Yards Trust & Savings

Bank, as successor-trustee to People's National Bank and Trust

Company under the trust deed, which appointment had been accepted

by the petitioner, and, thus by reason of the terms of the trust

deed the petitioner became invested with all the powers, rights,

estate and interests of the original trustee; that the bill of assignment

again herein was not filed until November 9, 1903; that petitioner,

as successor-trustee, is in possession of the real estate for which

a receiver is sought and is collecting the rents, issues and profits

for the benefit of all the mortgagees, including the mortgagees;

that the holder of one of the unpaid bonds secured by the trust

deed declared the whole of the principal secured to be at once due

and payable and requested petitioner to institute a suit for the

enforcement of the trust deed for the benefit of the holders of all

the unpaid bonds, whereby he became petitioner from said date

and requested that on November 11, 1903, petitioner file the bill

of assignment for the enforcement of the trust deed for the use and

benefit of all the mortgagees, and that said same be entered

Green Yards Trust & Savings Bank, a corporation organized under the laws

of Cook County, Illinois, as Successor-Trustee, et al., vs. the

State of Illinois, et al., as Guarantors, Defendants, et al., as the

Trustees of the People's National Bank and Trust Company, et al., as the

Trustees of the People's National Bank and Trust Company, et al., as the

Trust & Savings Bank of Successor-Trustees, and its successors et

this appointment; demand in writing that the Successor-Trustee institute foreclosure proceedings; the bill of complaint filed by the petitioner, together with the copy of the trust deed, which bill contained the usual prayer for relief, including the appointment of a receiver; petitioner asked for leave to have its intervening petition stand as an answer to the motion of complainant for a receiver and that a hearing may be had on said motion and that the same should be denied.

As we have said, on December 30, 1932, leave was given to the petitioner to file its petition and it was ordered to stand as an answer to the motion of complainant for the receiver; the order of December 31, 1932, upon hearing of the motion for a receiver and the objections based upon the intervening petition, recites that "the cause came on to be heard upon said intervening petition, and said complainant admitting the facts therein well pleaded but denying the legal sufficiency thereof," and the court being fully advised and having on its own motion entered an order consolidating the two motions, ordered that "the complainant's objections to the legal sufficiency of said petition be sustained and the prayer of the petition denied" and complainant's motion for a receiver was allowed. The record thus shows that complainant admitted the appointment of the Stock Yards Trust & Savings Bank as successor-trustee, and that this appointment had been duly recorded in the Recorder's office two days prior to the filing of complainant's bill.

Complainant in her brief attacks the validity of this appointment, setting forth various allegations in her bill with regard to this. Although contrary to the averments of complainant's bill, the facts are conceded of record and must guide us on this appeal. It is said that an appointment made after the expiration of thirty days is void. The trust deed cannot be so construed.

This was done; and in writing that the Commission-Trustee
located the Commission proceedings; the Bill of complaint filed by
the petition, together with the copy of the trust deed, which it
contained the actual papers for which, including the appointment
of a receiver, petition asked for leave to have the following
petition stand as an answer to the motion of complaint for a
receiver and that a hearing may be had on said motion and that the
same should be denied.

It was then said, on December 21, 1901, leave was given to
the petition to file its answer and it was ordered so stated as
an answer to the motion of complaint for the receiver; the order
of December 21, 1901, was recorded at the office for a receiver and
the order was read with the following petition, written and
"the same came on to be heard upon said answering petition, and
with complaint stating the facts therein well pleaded and duly
advised and having on its own motion entered an order annulling
the said petition, entered with the complaint, and the order of
the petition denied" and complaint's motion for a receiver was
granted. The court then made that complaint stating the mo-
tion of the stock holder that a hearing had been held on December
19, 1901, and that this complaint had been duly recorded in the
court's office the day prior to the filing of complaint's
Bill.

Complaint is not valid because not verified by this op-
ponent, stating that before all evidence is not still with me
and in this. Although complaint is the answer to complaint's
Bill, the Bill was entered of record and must stand as on this
motion. It is said that an appointment made after the motion
of July day is void. The time does stand as on motion.

The provision is, that in case the holders of the bonds do not agree upon the appointment of a new trustee "within thirty (30) days after such vacancy shall occur," then the holder of any bond may apply to the Circuit court of Cook county for the appointment of a new trustee. The "thirty days" referred to is not a limitation upon action of the bondholders but is a limitation upon the holder of a bond applying to the Circuit court. This cannot be done until after the expiration of thirty days. The bondholders had appointed a successor-trustee prior to filing of complainant's bill. Other technical criticisms are made which are without merit. The facts stated in the intervening petition and admitted by complainant show the proper appointment and acceptance of the successor-trustee.

Complainant seems to argue that by the order consolidating her bill with that of the successor-trustee, her bill achieves standing on a par with the successor-trustee's bill of complaint, and, that since both ask for the appointment of a receiver it was immaterial whether the appointment was made upon her bill or the bill of the successor-trustee. We do not see how consolidation of a bill properly filed with a bill filed without right, can invest the latter with merit. Furthermore, the order appointing the receiver is upon complainant's bill which complainant had no right to file.

We cannot agree with the statement in complainant's brief, that objections having been sustained to the intervening petition, the facts stated therein are as if they did not exist so far as this interlocutory appeal is concerned. The objections sustained went to the legal sufficiency of the petition. The facts admitted may be considered by this court in passing upon the propriety of this ruling. The basis of the ruling of the chancellor sustaining the objections does not appear in the record. In oral argument it was stated in

substance that the chancellor was of the opinion that any individual bondholder could file a bill to foreclose and move for the appointment of a receiver, regardless of the limitations expressed in the trust deed. Nevertheless, we adhere to our opinion, frequently expressed, that where the trust deed gives the exclusive right to the trustee to institute foreclosure proceedings, no individual bondholder may do so.

Complainant cites a number of cases of this court wherein we have said that we will not always, in passing upon an interlocutory order of this kind, examine into the merits of the controversy for the purpose of arriving at a conclusion as to which side should prevail. In Mayer v. Colling, 263 Ill. App. 219, we said that the essential test on such an appeal should be the probabilities of the case and a consideration of the situation presented, and that the determination of the propriety of the interlocutory order may occasionally involve a consideration of the bill. In the instant case we have considered all the facts appearing in the record, including complainant's bill, for the purpose of determining whether the appointment of a receiver at the instance of an independent individual bondholder should be sustained. From this examination and consideration we are of the opinion that prior to the filing of complainant's bill the Stock Yards Trust & Savings Bank, a corporation, had been duly appointed and qualified as successor-trustee, and had the exclusive right to file a bill to foreclose. To permit individual ^{each} bondholders to file his bill and move for the appointment of a receiver would make confusion worse confounded. It does not avail to say that no harm is done; that, as the successor-trustee has also asked for a receiver, it is immaterial upon whose motion the appointment is made. Aside from the question of confusion, the request for the appointment of a receiver must rest upon some clear right in the mover. This right the complainant did not have.

For the reasons indicated we hold that the appointment of a receiver upon the motion of the complainant was improperly entered, and the order is reversed.

REVERSED.

Matchett and O'Connor, JJ., concur.

For the reasons stated we have decided to grant the application of the applicant for a license to sell and distribute the product of the applicant in the State of New York.

Very truly yours,

WILLIAM W. LORAN, Jr., Secretary.

36567

PHILIP POPOVICH,

Appellee,

v.

ATLANTIC & PACIFIC STAGES, INC.,
a Corporation,

WILLIAM J. POPPER,

Appellant.

APPEAL FROM

CIRCUIT COURT,

COOK COUNTY.

270 I.A. 611²

Opinion filed March 22, 1933

MR. PRESIDING JUSTICE WILSON DELIVERED THE OPINION OF THE COURT.

This cause comes on to be heard on a plea of release of errors and a demurrer thereto. The appeal here grows out of an order entered in the Circuit Court finding one Popper, an attorney, entitled to a lien on money deposited with the Clerk of the Circuit Court. The claim allowed was for \$110.00. The entire amount of the judgment so deposited was \$350.00. Popper claimed a larger fee than that allowed, and prayed an appeal. After the appeal Popper applied to the Circuit Court of Cook County and demanded the sum of \$110.00, which he received. It is insisted that the acceptance of this amount estopped Popper from proceeding further with the appeal.

We are of the opinion that, having accepted the benefits to the full extent of the sum allowed by the court, the order and judgment of the Circuit Court has been ratified and the appellant here is estopped to proceed with the action.

The fact that the order of the court granted leave to withdraw the sum of \$110.00 without prejudice does not change the legal effect of the withdrawal. The prejudice, if any, was to the defendant and not the petitioner.

For the reasons stated in this opinion the demurrer to the plea of release of errors is overruled and the judgment affirmed.

JUDGMENT AFFIRMED.

HEBEL AND HALL, JJ. CONCUR.

UNITED STATES DISTRICT COURT

APPEAL

v.

ATLANTIC & PACIFIC STEAMSHIP, INC.,
a corporation

CHAS. L. FOWLER,

Appellant.

Opinion filed March 28, 1933

THE REMANDING JUDGE WILSON BELIEVES THE OPINION OF THE COURT.

This cause comes on to be heard on a plea of release of error and a demurrer thereto. The appeal here grows out of an order entered in the Circuit Court fixing one paper, an attorney, entitled to a lien on money deposited with the clerk of the Circuit Court. The claim allowed was for \$150.00. The entire amount of the judgment so deposited was \$250.00. Paper claimed a larger fee than that allowed, and prayed an appeal. After the appeal paper applied to the Circuit Court of Cook County and demanded the sum of \$150.00, which he received. It is insisted that the acceptance of this amount estopped paper from proceeding further with the appeal. We are of the opinion that, having accepted the benefits to the full extent of the sum allowed by the court, the order and judgment of the Circuit Court has been nullified and the appeal here is estopped to proceed with the action.

The fact that the clerk of the court granted leave to withdraw the sum of \$150.00 without prejudice does not change the legal effect of the withdrawal. The withdrawal, it may, run to the defendant and not the plaintiff.

For the reasons stated in this opinion the demurrer to the plea of release of error is overruled and the judgment affirmed.

WILSON, JUDGE.

220 I.A. 811

COOK COUNTY.

CIRCUIT COURT.

UNITED STATES

38617

PEOPLE OF THE STATE OF ILLINOIS,
Ex rel Josephine Mahnke, Dependent
Child,

Defendant in Error,

v.

VIOLA NOWICKI, Intervening Petitioner,
Plaintiff in Error.

4
ERROR TO

7
CIRCUIT COURT,

COOK COUNTY.

270 I.A. 611³

OPINION FILED March 22, 1933

MR. PRESIDING JUSTICE WILSON DELIVERED THE OPINION OF THE COURT.

This matter comes before us on a writ of error to review an order of the Circuit (Juvenile) Court of Cook County, denying the motion of Viola Nowicki to vacate an order of that court previously entered finding Josephine Mahnke a dependent, taking her from the custody of her parents, and placing her under proper guardianship. The petitioner Viola Nowicki is an aunt of the child, Josephine Mahnke.

No writ of error was sued out to the original proceeding. This motion appears to be an attempt to reach the original judgment of the Juvenile Court collaterally. This can not be done unless it appears that the court entering the original judgment was without jurisdiction. In re Mendevill, 193 Pac. 17; 21 Ariz. 586.

The petitioner here seeks by her motion to intervene in a cause already tried. It does not appear that the petitioner Nowicki was a necessary party to the proceeding.

Upon the filing of the original petition to have Josephine Mahnke declared a dependent, the People became the real party in interest and the petitioner in the original proceeding ceased to

exist as such. The People v. Piccolo, 375 Ill. 453. A writ of error is a new suit. The petition presented to us by the writ does not constitute a new suit, but is only at most an attempt to intervene in the original one.

The question, as to whether or not the People being the real party the writ of error should have been to the Supreme Court, is not raised.

We see no reason for considering the question and the motion of The People to dismiss the writ of error on the record here will be and hereby is allowed.

WRIT OF ERROR DISMISSED.

NEBEL AND HALL, J. CONCUR.

which he found. The London & Lancashire, the latter, a visit of

order to a new hotel. The decision was made to go by the

this does not constitute a new visit, but in fact it was an attempt

to interview in the morning one.

The committee, as it was then, was not the same as the

that would be the visit of the committee to the London, Lancashire,

is not known.

It was no longer the committee of the London and Lancashire

which of the people to which the visit of the committee to the London

will be not known is known.

will be known.

will be known.

36081

STANDARD ENCYCLOPEDIA CORPORATION, a
corporation,

(Plaintiff) Appellant,

v.

ALMA THOMPSON LEAVERTON,

(Defendant) Appellee.

APPEAL FROM

MUNICIPAL COURT

OF CHICAGO.

270 I.A. 612

Opinion filed March 29, 1933

MR. PRESIDING JUSTICE WILSON DELIVERED THE OPINION OF THE COURT.

The plaintiff Standard Encyclopedia Corporation brought its action in the Municipal Court against the defendant Alma Thompson Leaverton to recover the purchase price of certain books sold by the plaintiff and purchased by the defendant. The defendant was served with the summons and a copy of the statement of claim but failed or refused to appear and defend. A judgment was entered for the plaintiff by default on January 25, 1932. The judgment was in tort and malice was the gist of the action. A capias was served on the 25th day of February, 1932. On February 29, 1932, the defendant filed a petition in the nature of a bill in equity under ²¹Section 21 of the Municipal Court Act, seeking to have the judgment vacated and the writ of capias ad satisfaciendum quashed. Upon a hearing upon this petition the suit was dismissed and the writ quashed and from that order this appeal is taken.

There is nothing in the petition showing diligence on the part of the defendant, nor does it appear from the petition that the judgment was entered through error by the court because of any mistake of law or fact. Plaintiffs statement of claim charges that the defendant requested of the plaintiff that it sell to her certain books, falsely and fraudulently representing at the time, that she would pay for the same, and that the plaintiff, relying upon these representations, sold the goods but that, as a matter of fact, the defendant did not intend to pay but has willfully, wantonly and maliciously concealed or disposed of them and refuses to pay the purchase price.

INDEX

STANDARD ELECTRIC CORPORATION, a corporation

(Plaintiff) Appellee

DEFENDANT

IN REPLY

LAST KNOWN ADDRESS

(Plaintiff) Appellee

270 I.A. 61

Opinion filed March 29, 1933

THE FOLLOWING OPINION WAS DELIVERED BY THE COURT:

The plaintiff Standard Electric Corporation brought this action in the District Court against the defendant last known address to recover the purchase price of certain goods sold by the defendant and purchased by the defendant. The defendant was served with the summons and a copy of the statement of claim but failed to answer or appear and defend. A judgment was entered for the plaintiff by default on January 25, 1933. The judgment was in favor and value was the first of the action. A copy was served on the defendant at January 25, 1933. On February 20, 1933, the defendant filed a petition in the nature of a bill in equity under section 21 of the Municipal Court Act, seeking to have the judgment vacated and the writ of error in satisfaction granted. From a hearing was had on this appeal is taken.

There is nothing in the petition showing diligence on the part of the defendant, nor does it appear from the petition that the judgment was entered through error by the court because of any mistake of law or fact. Plaintiff's statement of claim charges that the defendant procured of the plaintiff that it sell to her certain goods, falsely and fraudulently representing at the time that she would pay for the same, and that the plaintiff, relying upon these representations, sold the goods but that, as a matter of fact, the defendant did not intend to pay but was willing, wittingly and maliciously to defraud or disposed of them and refused to pay the

It is clear from the record that the court had jurisdiction of the cause and of the subject-matter and through service of process together with a copy of the statement of claim, also acquired jurisdiction of the defendant. It is insisted, however, on behalf of the defendant that the statement of claim fails to state a cause of action in fraud upon which a judgment could be based which would entitle the plaintiff to execution against the body of the defendant. The action was one of the fourth class in the Municipal Court, and the proceeding in such case is not necessarily determined by the pleadings but is such as the evidence makes it. The judgment, entered after the default, recites that the cause came on for hearing before the court without a jury and evidence being heard, the court found the issues in favor of the plaintiff and against the defendant.

It is urged that the statement of claim does not state such facts as would entitle the plaintiff to recover a judgment for fraud and deceit against defendant in obtaining the goods through fraudulent representations or false pretenses; that if the vendor, the plaintiff below, intended to rely upon the misrepresentations of the defendant, it should have rescinded the sale and sued in tort; that the action having been for the price and value of the goods, it was an action in assumpsit and would not sustain a judgment in tort giving plaintiff the right to an execution against the body of the defendant. The People, ex rel. v. Healy, 128 Ill. 9; Brodsky v. Frank, 342 Ill. 110. The statement of claim did not charge facts showing any misrepresentations as to an existing fact which induced the plaintiff to sell the goods in question and, so far as the statement of claim is concerned, in our opinion a judgment based on fraud could not be based upon such statement alone, and probably would not have been if called to the attention of the trial court. The case

It is clear from the record that the court had jurisdiction of the cause and of the subject-matter and through service of process together with a copy of the statement of claim, also

negotiated jurisdiction of the defendant. It is insisted, however, on behalf of the defendant that the statement of claim fails to state a cause of action in favor upon which a judgment could be

granted which would entitle the plaintiff to execution against the body of the defendant. The action was one of the fourth class in the Municipal Court, and the proceeding in such case is not necessarily determined by the pleading but is such as the evidence

shows. The plaintiff, without any objection, wishes to have the cause heard on for hearing before the court without a jury and evidence being heard, the court found the issues in favor of the

plaintiff and against the defendant. It is urged that the statement of claim does not state such facts as would entitle the plaintiff to recover a judgment for fraud and deceit against defendant in obtaining the goods through

fraudulent representations or false pretenses; that if the vendor, the plaintiff below, intended to rely upon the misrepresentation of the defendant, it should have recited the date and time in which

that the notice having been the price and value of the goods, it was no action in assumpsit and would not warrant a judgment in favor of the plaintiff. The right is an exception against the body of

the defendant. THE PEOPLE OF THE CITY OF CHICAGO, PLAINTIFFS, V. THE CHICAGO & NORTH DAKOTA RAILROAD COMPANY, DEFENDANTS. The statement of claim did not charge facts

showing any misrepresentation as to an existing fact which induced the plaintiff to sell the goods in question and, in the opinion of the court, is insufficient, in our opinion a judgment based on fraud

could not be based upon such statement of facts, and judgment would not have been entered in the judgment of the trial court. The case

of The People, ex rel v. Henly, supra, was a mandamus proceeding in which it was sought to have the court issue a mandamus to compel the sheriff to levy a second execution against the body of the defendant. The court held that the writ should not issue: First, because the declaration did not state facts sufficient to sustain a body execution; and Second, that it appeared that the defendant had already once been incarcerated under the same judgment. The case of Brodsky v. Frank, supra, was considered on a writ of error.

The defect in the statement of claim in the proceeding under consideration could have been reached by a writ of error ~~or~~ on an appeal, but it comes to us on the question as to whether or not the trial court had the power after the expiration of the term to vacate the judgment upon the facts set forth in the petition filed under section 21 of the Municipal Court Act. This petition is in the nature of a bill in equity and two things must appear in the petition: First, that the debtor has a good and meritorious defense to the action; and Second, that the judgment was in no manner the result of lack of diligence on the part of the defendant. The petition admits that the defendant had no defense to the action if it sounded in assumpsit and, therefore, the plaintiff was entitled to recover a judgment even though it should^{not}/have been in tort. It appears from the petition, however, that the defendant instead of exercising diligence, wholly failed and neglected to protect her own interest by appearing and defending the cause. Equity will not protect the interests of those who wholly fail to protect such interests themselves. American Surety Co. of N. Y. v. Bliss, 214 Ill. App. 463; Izzi v. Ialongo, 248 Ill. App. 90.

From the record it appears that the trial court vacated the judgment and quashed the execution against the body of the defendant. In view of the rule laid down by the courts in this state,

of the People, ex rel. v. Franklin, was a mandamus proceeding in which it was sought to have the court issue a mandamus to compel the sheriff to levy a second execution against the body of the defendant. The court held that the writ should not issue; first, because the execution did not state facts sufficient to sustain a body execution; and second, that it appeared that the defendant had already once been incarcerated under the same judgment. The case of Franklin v. Franklin, was considered on a writ of error.

The defect in the statement of claim in the proceeding under consideration could have been reached by a writ of error on an appeal, but it comes to us on the question as to whether or not the trial court had the power after the expiration of the term to reverse the judgment upon the facts set forth in the petition filed under section 31 of the Municipal Court Act. This petition is in the nature of a bill in equity and two things must appear in the petition, first, that the debtor has a good and certain debt due to the creditor; and second, that the judgment was in no manner the result of lack of diligence on the part of the defendant. The petition states that the defendant had no defense to the action if it appeared in the petition, and that the plaintiff was entitled to recover a judgment even though it should have been in fact. It appears from the petition, however, that the defendant instead of exercising diligence, wholly failed and neglected to protect her own interest by appearing and defending the cause. Doubtless will not protect the interests of those who wholly fail to protect such interests themselves. Franklin v. Franklin, 200 Ill. App. 2d 111.

Frank v. Franklin, 200 Ill. App. 2d 111.

From the record it appears that the trial court reversed the judgment and remanded the execution against the body of the defendant. In view of the rule laid down by the courts in this state

a body execution would not be sustained on the facts set forth in the statement of claim. On the other hand, the judgment was good for the amount of the finding of the trial court and the court was without power to set that judgment aside as it had lost jurisdiction of the cause through the expiration of the term of court.

For the reasons set forth in this opinion, the order of the Municipal Court vacating the judgment is set aside and the cause is remanded with directions to that court to expunge said order from the record and the original judgment to stand.

JUDGMENT REVERSED AND CAUSE REMANDED
WITH DIRECTIONS.

HEBEL AND NALL, JJ. CONCUR.

A body of evidence would not be maintained on the basis of this in the absence of other. On the other hand, the judgment was based

on the basis of the finding of the trial court and the court was not bound by the finding of the trial court as it had the right to make its own judgment on the basis of the evidence.

The fact remains that in this opinion, the court of the highest court rendered the judgment is not alone and the court is not bound by the finding of the trial court as it had the right to make its own judgment on the basis of the evidence.

THE COURT OF THE HIGHEST COURT

IN THE COURT OF THE HIGHEST COURT

THE COURT OF THE HIGHEST COURT

36093

CHICAGO TITLE AND TRUST COMPANY, a
corporation,

(Plaintiff) Appellee,

v.

JOSEPH B. DRELL,

(Defendant) Appellant.

APPEAL FROM

MUNICIPAL COURT

OF CHICAGO.

270 I.A. 612²

Opinion filed March 29, 1933

MR. PRESIDING JUSTICE WILSON DELIVERED THE OPINION OF THE COURT.

Plaintiff recovered a judgment in the Municipal Court of Chicago, for services rendered, from which judgment defendant appealed. The services rendered were based upon an application for a guarantee policy covering the title of real estate charged to have been owned by the defendant Joseph B. Drell and made upon his application and request. The application, however, is signed, M. A. Mills, applicant, and underneath the signature of Mills appears the words, "on behalf of owner", evidently in the handwriting of Mills. The application provides that the applicant shall pay a reasonable charge for services rendered in case the company shall decline to issue the policy. The defendant in his affidavit of merits denies that he ordered the issuance of the application. Reference is made in the brief filed on behalf of the plaintiff to an affidavit signed by the defendant and evidently found in the files of Mills, but we find no such affidavit in the record. By the files of Mills it is evidently intended that the references were, in reality, to the files of the company kept under the name of Mills. There is no evidence as to how this affidavit came into its possession. There is nothing in the record to show that the files of the company were kept in the regular order of business and there is no positive testimony that the policy of insurance sued upon was delivered to the defendant.

Opinion filed March 29, 1933

THE FOLLOWING IS A SUMMARY OF THE OPINION OF THE COURT.
 The plaintiff recovered a judgment in the Municipal Court of Chicago, for services rendered, from which judgment defendant appeals. The services rendered were based upon an application for a guarantee policy covering the title of real estate alleged to have been owned by the defendant through H. Willis and made upon his application and request. The application, however, as signed, H. A. Willis, applicant and undersigned the signature of Willis appears the words, "on behalf of owner," evidently in the handwriting of Willis. The application provided that the applicant shall pay a reasonable charge for services rendered in case the company shall decide to issue the policy. The defendant in his affidavit of service declares that he entered the issuance of the application. Reference is made in the brief filed on behalf of the plaintiff to an affidavit signed by the defendant and evidently found in the files of Willis, but we find no such affidavit in the record. By the files of Willis it is evidently intended that the references were, in reality, to the files of the company kept under the name of Willis. There is no evidence as to how this affidavit came into its possession. There is nothing in the record to show that the files of the company were kept in the regular order of business and there is no positive testimony that the policy of insurance was upon was delivered to the defendant.

At the end of plaintiff's case the court directed the jury to bring in a verdict in favor of the plaintiff.

Agency can not be proven by the agent but his acts may be ratified by the principal. If, as a matter of fact, a policy of insurance issued and was accepted by the principal, it would be a sufficient ratification. If the defendant in this cause, after the filing of the application with the plaintiff company, signed and filed an affidavit in furtherance of the procurement of the policy it would be evidence of a ratification sufficient to sustain a judgment. While such an affidavit is referred to in the testimony, we find no such instrument in the record.

In view of the unsatisfactory condition of the record as we find it, we are of the opinion that the Municipal Court erred in directing a verdict and the judgment is, therefore, reversed and the cause remanded for a new trial.

JUDGMENT REVERSED AND CAUSE
REMANDED.

HEBEL AND HALL, J.J. CONCUR.

at the end of plaintiff's case the court directed the
jury to bring in a verdict in favor of the plaintiff.
The court was not moved by the fact that the plaintiff
was advised by the witness, it was a matter of fact, a matter of
law, and was accepted by the witness, it would be a
sufficient testimony. If the defendant in this case, after the
trial of the application with the plaintiff company, signed and
filed an affidavit in furtherance of the payment of the policy,
it would be evidence of a satisfaction sufficient to sustain a
judgment. While such an affidavit is relevant to the testimony,
it is not a matter of fact in the present.

It is also of the necessary condition of the property
in the fact of the opinion that the plaintiff's
case is a question of law and the defendant's testimony, however
and the case concluded for a new trial.

RECEIVED BY THE COURT
JANUARY 1, 1900

RECEIVED BY THE COURT
JANUARY 1, 1900

36111

MAY RINELLA,

Appellant,

v.

ELSIE HALVORSEN,

Appellee.

APPEAL FROM

SUPERIOR COURT,

COOK COUNTY.

270 I.A. 612³

Opinion filed March 29, 1933

MR. PRESIDING JUSTICE WILSON DELIVERED THE OPINION OF THE COURT.

Plaintiff brought her action to recover damages for personal injuries sustained by reason of a collision between a car in which she was riding as a passenger and another car driven by the defendant. The accident happened between 8:30 and 9:00 o'clock in the evening of November 25, 1929, at the intersection of Western avenue and Morse avenue, two intersecting streets in the City of Chicago. The cause was submitted to a jury and a verdict returned finding the defendant not guilty and judgment was entered upon the verdict. To reverse that judgment this appeal is brought to this court.

The facts disclose that the plaintiff was riding in the back seat of a Cadillac touring car which was being driven by one McGowan, a young man about 21 years of age. The automobile was proceeding in a northerly direction on Western avenue and, according to the testimony of one Michael Arrigo who was riding in the front seat with the driver, they were proceeding at about 25 miles an hour and that the headlights were burning; that as the car reached Morse avenue, defendant's car came from the south and turned suddenly in front of the car driven by McGowan and, in order to avoid a collision, he, McGowan, swung his car to the right or in an easterly direction, but too late to avoid the accident.

The defendant Elsie Halvorsen, testified that she was driving south on Western avenue and that her husband was sitting in the front seat with her at the time of the accident; that when she reached the center of Morse avenue she started to turn to the left and at this

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Opinion filed March 29, 1938

Plaintiff brought her action to recover damages for personal injuries sustained by reason of a collision between a car in which she was riding as a passenger and another car driven by the defendant. The accident happened between 8:30 and 9:00 o'clock in the evening of November 22, 1935, at the intersection of Western Avenue and Horse Avenue, two intersecting streets in the City of Chicago. The cause was admitted to a jury and a verdict returned finding the defendant not guilty and judgment was entered upon the verdict. To reverse that judgment this appeal is brought to this court.

The facts disclose that the plaintiff was riding in the back seat of a Cadillac touring car which was being driven by one McGowan, a young man about 21 years of age. The automobile was proceeding in a westerly direction on Western Avenue and, according to the testimony of one Michael Luriga who was riding in the front seat with the driver, they were proceeding at about 25 miles an hour and that the headlights were burning; that as the car reached Horse Avenue, defendant's car came from the south and turned suddenly in front of the car driven by McGowan and, in order to avoid a collision, he, McGowan, swung his car to the right or in an easterly direction, but was hit by the defendant.

The defendant Elsie McGowan, testified that she was driving south on Western Avenue and that her husband was sitting in the front seat with her at the time of the accident; that when she reached the center of Horse Avenue she started to turn to the left and at this

time the car in which the plaintiff was riding was about 100 feet south. She testified that in her opinion she had plenty of time to cross in front of the approaching car; that she was going about 10 miles an hour and in second speed. Her husband testified to practically the same facts except that he stated that as they headed east he noticed the car driven by McGowan approaching at a very fast speed and that his wife stepped on the gas in order to speed up the car and to get by before the oncoming car reached them.

We are asked to reverse the judgment on the ground that the verdict is against the manifest weight of the evidence.

The question as to whether or not the defendant turned her car suddenly into the path of the oncoming machine in which plaintiff was riding, or whether the car driven by McGowan in which plaintiff was riding was proceeding at too dangerous a rate of speed, were questions of fact for the jury. The evidence was conflicting and a reviewing court will not, under such circumstances, substitute its opinion for that of the jury. Garney v. Sheedy, 295 Ill. 78.

A photograph of defendant's car was introduced in evidence over objection of the plaintiff. Allen Halvorsen who was riding in the car with his wife at the time of the accident testified that he saw the car in a garage on Western avenue about a week after the accident and that the picture correctly represented its appearance at the time. It was not error to admit this photograph in evidence. The witness stated it was a correct representation of the car as of that time. The case of Ryan v. City of Chicago, 181 Ill. App. 643, cited by counsel for plaintiff, is not in point. In that case the picture, or photograph, was taken two or three years after the accident and the probability of changes in conditions were such as to justify the court in refusing to admit it in evidence. The question as to whether or not a photograph is a correct representation of a condition is one resting largely in the discretion of the

time the car in which the plaintiff was riding was about 100 feet
south. The testimony that in her opinion she had plenty of time
to cross in front of the approaching car; that she was going about
10 miles an hour and in second speed. Her husband testified that
practically the same time except that he stated that as they headed
east he noticed the car directly in front of them at a very fast
speed and that his wife stepped on the gas in order to speed up
the car and to get by before the oncoming car reached them.
He was asked to reverse the judgment on the ground that
the verdict is against the weight of the evidence.
The question now arises as to the evidence in this case.
The testimony of the plaintiff is that the oncoming machine in which plaintiff
was riding, at the time the car was by her side in which plaintiff
was riding was proceeding at too dangerous a rate of speed, were
questions of fact for the jury. The evidence was conflicting and a
verdict cannot be made, under such circumstances, especially in
opinion for that of the jury. Johnson v. Johnson, 222 Ill. 72.
A photograph of defendant's car was introduced in evidence
over objection of the plaintiff. Allen Kellerman who was riding
in the car with him at the time of the accident testified that
he saw the car in a garage on West 17th Street about a week after the
accident and that the picture correctly represented its appearance
at the time. It was not error to admit this photograph in evidence.
The evidence showed it was a correct representation of the car at
that time. The People v. John A. Johnson, 222 Ill. 72.
It is counsel for plaintiff, in not in value. In that case the
plaintiff's photograph, was taken two or three years after the
accident and the probability of changes in conditions were such as
to justify the court in refusing to admit it in evidence. The
question as to whether or not a photograph is a correct representation
of a condition is one relating largely to the character of the

trial court, and we find there was no abuse of such discretion in the case at bar.

Objection is made to giving of instruction number 2, on behalf of the defendant, on the ground that it directed a verdict in favor of the defendant. We do not so construe the instruction. A similar instruction was approved in the case of Regal v. Chicago City Ry. Co., 256 Ill. App. 569. It is sought to differentiate the Regal case from the case at bar on the ground that the defendant in that case was a street car company operating a street car and that it was impossible for the motorman to do other than operate his car in a straight line. The same objection was made to the instruction in that case as here, in that it limited the motorman's exercise of care to the time consumed in approaching the place of the accident and ignored the question as to whether he was guilty of negligence at the time of the collision.

A number of instructions were given in the case at bar and the subject of due care at the time of the accident was fully covered.

The objection to the 6th instruction given on the part of the defendant is without merit. This instruction not only required the defendant to exercise due care in the driving of her car as it approached the place of the accident, but also required the defendant to do all that she could to avoid the accident in question as soon as it was ascertainable to her that the car in which plaintiff was riding was getting near the path of the car which defendant was driving. All that was required of the defendant was that she should do all she could to avoid the accident in the exercise of ordinary care.

From an examination of the record of this case we are of the opinion that the question was one properly submitted to the jury for its consideration. There is no reversible error in the record, and for the reasons stated in this opinion the judgment of the Superior Court is affirmed.

JUDGMENT AFFIRMED.

HEBEL AND HALL, JJ. CONCUR.

trial court, and we find there was no issue of such character in the case at bar.

Objection is made to giving of instruction number 3, on behalf of the defendant, on the ground that it directed a verdict in favor of the defendant. We do not so construe the instruction. A similar instruction was approved in the case of Smith v. Chicago City Ry. Co., 111 Ill. App. 3d, 15. It is necessary to determine the legal issue in the case at bar on the ground that the defendant in that case was a street car company operating a street car and that it was impossible for the motorist to do other than witness his car in a straight line. The same objection was made to the instruction in that case as here, in that it limited the motorist's theories of care to the time when it was approaching the place of the accident and ignored the question as to whether he was guilty of negligence at the time of the collision.

A number of instructions were given in the case at bar and the subject of this case at the time of the accident was fully covered. The objection to the 3th instruction given on the part of the defendant is without merit. This instruction not only required the defendant to exercise due care in the driving of her car as it approached the place of the accident, but also required the defendant to do all that she could to avoid the accident in question as soon as it was ascertainable to her that the car in which plaintiff was riding was getting near the path of the car which defendant was driving. All that was required of the defendant was that she should do all she could to avoid the accident in the exercise of ordinary

care. From an examination of the record of this case we are of the opinion that the question was not properly submitted to the jury for its consideration. There is no evidence that the plaintiff or the defendant were negligent.

36120

MILDRED A. DAVIES,

Appellee,

v.

MARKS BROS. THEATRES, INC., a
corporation,

Appellant.

APPEAL FROM

SUPERIOR COURT,

COOK COUNTY.

270 I.A. 612⁴

Opinion filed March 29, 1933

ON REMARKING.

MR. PRESIDING JUSTICE WILSON DELIVERED THE OPINION OF THE COURT.

The evidence shows that plaintiff, while walking upon a sidewalk in the City of Chicago adjacent to the theatre building owned and operated by the defendant, was struck by a heavy sign which fell from the building and injured her.

The declaration consisted of two counts.

The first count charged that the defendant was operating a theatre building in the City of Chicago which contained entrances to the premises and which was located on one of the public streets of that city; that upon the front outside wall of said building was a sign advertising the attractions shown within; that the defendant carelessly and negligently caused or permitted and allowed said sign to become detached and loosened from the outside wall of the theatre, and as a result thereof, the sign fell upon the plaintiff and she was injured.

The second count charges the defendant with carelessly and negligently attaching or causing the sign to be attached to the outside wall of the building as a result of which it fell and injured the plaintiff.

The facts in evidence bring the action clearly within the rule of res ipsa loquitur, 20 R. C. L. 191; Kiewert v. Balaban & Katz Corp., 251 Ill. App. 342; Simmons v. Commonwealth Edison Co., 203 Ill. App. 357; Burdette v. The Chicago Aud. Assn., 166 Ill. App. 186.

ALABAMA

IN SENATE

REPORT OF THE

COMMISSIONER

OF THE

Opinion filed March 29, 1933

ALABAMA

THE ALABAMA JUDICIAL SYSTEM HAS BEEN THE SUBJECT OF MUCH INTEREST AND CONCERN IN THE PAST FEW YEARS. THE COMMISSIONER OF THE JUDICIAL SYSTEM HAS BEEN DEDICATED TO THE IMPROVEMENT OF THE JUDICIAL SYSTEM AND HAS BEEN SUCCESSFUL IN MANY OF HIS EFFORTS. THE COMMISSIONER HAS BEEN SUCCESSFUL IN OBTAINING THE PASSAGE OF THE JUDICIAL SYSTEM ACT, WHICH HAS BEEN A MAJOR STEP IN THE REFORM OF THE JUDICIAL SYSTEM. THE COMMISSIONER HAS ALSO BEEN SUCCESSFUL IN OBTAINING THE PASSAGE OF THE JUDICIAL SYSTEM ACT, WHICH HAS BEEN A MAJOR STEP IN THE REFORM OF THE JUDICIAL SYSTEM.

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The charge in the declaration was general in its terms and the proof offered was of such a character as to raise a presumption of negligence.

Defendant made a motion for a new trial at the close of all the evidence and a motion in arrest of judgment, but no motion was made at the end of plaintiff's case to direct a verdict on the ground of variance. We are of the opinion that the declaration was sufficiently broad in its charges of general negligence to support the declaration. If the attention of the trial court had been called to the fact that the declaration charged specific negligence, it could have easily been corrected upon the trial. Mascolone v. Metropolitan Elevated Railway Co., 239 Ill. 12; Simons v. Commonwealth Edison Co., 303 Ill. App. 367; Burdette v. The Chicago Aud. Assn., 166 Ill. App. 186; Chicago City Railway Co. v. Carroll, 206 Ill. 318.

The instruction tendered on behalf of the defendant and which was refused by the court, was an instruction to the effect that "the mere fact, if you find it to be a fact, that the sign struck the plaintiff, is not sufficient to entitle the jury to find the defendant guilty. Before the jury can find the defendant guilty it must appear from the preponderance of the evidence * * * that the defendant was guilty of some negligent act charged in the plaintiff's declaration * * *." In view of the fact that the accident itself raised a presumption of negligence, it was not necessary that the plaintiff prove specific negligence. The happening of the accident itself was sufficient to raise a presumption of general negligence and the refusal of this instruction was not error.

During the examination of the plaintiff, in answer to a question propounded, she volunteered the information that the manager of the defendant company had stated that the sign had fallen on some previous occasion. On motion of counsel for defendant this

testimony was stricken out and thereafter a motion was made by counsel for defendant to withdraw a juror and to have the cause continued. This motion was denied. We see no error in this, however, as the error, if any, was cured by the action of the trial court in striking out the evidence. Moreover, it is not error to introduce evidence of prior accidents occurring under the same or similar circumstances as it has a tendency to prove knowledge on the part of the defendant.

The Supreme Court of this state in the case of Moore v. M. E. & O. R. R. Co., 295 Ill. 63, in its opinion said:

"The rule in relation to the competency of testimony of other accidents is, that where such testimony tends to show the common cause of the accidents to be a dangerous, unsafe thing or condition the evidence as to such accidents is competent, not for the purpose of showing independent acts of negligence but for the limited purpose of showing that the unsafe thing or condition causing the particular accident was the condition or cause common to such independent accidents, and that the frequency of such accidents tends to show knowledge of such condition. (City of Chicago v. Jarvis, 226 Ill. 614; Mobile and Ohio Railroad Co. v. Vallowa, 314 id. 124; City of Taylorville v. Stafford, 196 id. 288; City of Wilmington v. Legg, 151 id. 9.)"

To the same effect see Healy v. Chicago City Ry. Co., 160 Ill. App. 7; Petty v. Stebbins, 164 Ill. App. 439.

It is insisted that the judgment for \$3,500.00 is excessive; that the answers of the physician Tenney to the hypothetical question, and from his own x-ray pictures clearly show that they were based upon the hypothesis that there was a fracture of plaintiff's foot. Plaintiff testified that prior to March 6, 1929, the day of the accident, she had never had any trouble with the foot; that when she was at the Edgewater Hospital on the day of the accident her foot was examined and an x-ray picture taken. She was never treated by any physician after the accident until sometime in June, 1930, in Michigan by a physician who did not testify in this cause and who recommended light treatments.

Tenney, on behalf of plaintiff, testified that he examined

her in March 1921, two years after the accident, and that he took x-ray pictures of plaintiff's foot which showed a fracture line in the third metatarsal at the proximal end. This bone is the largest bone in the foot. He was asked a hypothetical question which included as a fact the following: "Assume further that she never had trouble with her foot before, etc." The answer of the witness to the hypothetical question was as follows: "My opinion is that this state of facts was the cause of the condition I found in the x-rays." It will appear from the following that the physician's testimony was based on the assumption that there was no previous injury and that the x-ray showed a fracture of the foot, which fracture was included in his answer as a basis upon which he predicated his opinion that the injury was permanent. The defendant introduced in evidence an x-ray picture taken at the hospital on the day of the accident and which we believe is authentic. This picture showed an old fracture of the foot. Tenney was recalled for further examination and examined this picture and stated that he was satisfied that it was a picture of the same foot of which he had taken x-ray pictures, and if the films were taken on the date of the accident, then the necessary conclusion to draw from the picture was the fact that it was an old fracture and was not a result of the injury in question. The testimony of this witness appears to have been based upon the fact that the fracture was the result of the injury which is the basis of this suit and the testimony is of such a character that we are of the opinion that the jury was influenced by this fact in arriving at its verdict.

We are of the opinion that the accident happened and that she received an injury to her foot, but, from the record as we find it, there is such doubt on the question as to whether or not the fracture resulted from the injury, that it necessitates a new trial.

...in March 1901, two years after the accident, and that he took
x-ray pictures of the foot which showed a fracture line in
the third metatarsal at the proximal end. This bone is the largest
bone in the foot. He was asked a hypothetical question which included
as a fact the following: "Assume further that she never had trouble
with her foot before, etc." The answer of the witness to the hypothe-
tical question was as follows: "My opinion is that this grade of
fracture was the cause of the condition I found in the x-rays." It
will appear from the following that the physician's testimony was
based on the assumption that there was no previous injury and that
the x-ray showed a fracture of the foot, which fracture was included
in his answer as a basis upon which he predicted his opinion that
the injury was permanent. The defendant introduced in evidence an
x-ray picture taken at the hospital on the day of the accident and
which he believed to be authentic. This picture showed an old fracture
of the foot. Henry was recalled for further examination and examination
this picture and stated that he was satisfied that it was a picture
of the same foot of which he had taken x-ray pictures, and if the
films were taken on the date of the accident, then the necessary
conclusion to draw from the picture was the fact that it was an old
fracture and was not a result of the injury in question. The testi-
mony of this witness appears to have been based upon the fact that
the fracture was the result of the injury which is the basis of this
case and the testimony is of such a character that we are of the
opinion that the jury was influenced by this fact in arriving at its
verdict.

We are of the opinion that the accident happened and that
the resulting injury to her foot, etc., from the accident as we find
it, there is some doubt as to the question as to whether or not the
fracture resulted from the injury, but it is manifestly a new trial.

If, as a matter of fact, the x-ray picture taken at the Edgewater Hospital disclosed an old fracture, as testified to by plaintiff's witness Tenney, then her statement that she never had any trouble with the foot before, was erroneous and tended to prejudice the jury.

For the reasons stated in this opinion the judgment of the Superior Court is reversed and the cause remanded for a new trial.

JUDGMENT REVERSED AND CAUSE REMANDED.

NEBEL AND HALL, JJ. CONCUR.

36120

MILDRED A. DAVIES,

Appellee,

v.

MARKS BROS. THEATRES, INC.,
a corporation,

Appellant.

APPEAL FROM

SUPERIOR COURT,

COOK COUNTY.

270 I.A. 612^{4A}

Opinion filed Feb. 8, 1933

MR. PRESIDING JUSTICE WILSON DELIVERED THE OPINION OF THE COURT.

The evidence shows that plaintiff, while walking upon a sidewalk in the City of Chicago adjacent to the theatre building owned and operated by the defendant, was struck by a heavy sign which fell from the building and injured her.

The declaration consisted of two counts.

The first count charged that the defendant was operating a theatre building in the City of Chicago which contained entrances to the premises and which was located on one of the public streets of that city; that upon the front outside wall of said building was a sign advertising the attractions shown within; that the defendant carelessly and negligently caused or permitted and allowed said sign to become detached and loosened from the outside wall of the theatre, and as a result thereof, the sign fell upon the plaintiff and she was injured.

The second count charges the defendant with carelessly and negligently attaching or causing the sign to be attached to the outside wall of the building as a result of which it fell and injured the plaintiff.

The facts in evidence bring the action clearly within the rule of res ipsa loquitur, 20 A. C. L. 191; Kiewert v. Balaban & Katz Corp., 251 Ill. App. 342; Simmons v. Commonwealth Edison Co.,

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Opinion filed Feb. 8, 1933

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The evidence shows that witness, while walking upon

a sidewalk in the City of Chicago adjacent to the street building

owned and operated by the defendant, was struck by a heavy wire

red horizontal line subdivided into four equal parts

...out to be a very different matter

THE FIRST COUNT CHARGED THAT THE DEFENDANT

A receipt billing in the City of Chicago when contained within

to the premises and which was located on one of the public streets

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To Her Majesty all most humble thanks be rendered for the same.

the above information was obtained from the records of the Bureau of the Census, Department of Commerce, and the Bureau of the Census, Department of the Interior.

Journal Nov 21st 1917

The second count charges the defendant with unlawfully

ALL INFORMATION CONTAINED HEREIN IS UNCLASSIFIED

the outside wall of the building as a result of which it fell and

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The tests in evidence being the action closely within

the rule of the law. 1911; 1912; 1913; 1914; 1915; 1916; 1917; 1918; 1919; 1920; 1921; 1922; 1923; 1924; 1925; 1926; 1927; 1928; 1929; 1930; 1931; 1932; 1933; 1934; 1935; 1936; 1937; 1938; 1939; 1940; 1941; 1942; 1943; 1944; 1945; 1946; 1947; 1948; 1949; 1950; 1951; 1952; 1953; 1954; 1955; 1956; 1957; 1958; 1959; 1960; 1961; 1962; 1963; 1964; 1965; 1966; 1967; 1968; 1969; 1970; 1971; 1972; 1973; 1974; 1975; 1976; 1977; 1978; 1979; 1980; 1981; 1982; 1983; 1984; 1985; 1986; 1987; 1988; 1989; 1990; 1991; 1992; 1993; 1994; 1995; 1996; 1997; 1998; 1999; 2000; 2001; 2002; 2003; 2004; 2005; 2006; 2007; 2008; 2009; 2010; 2011; 2012; 2013; 2014; 2015; 2016; 2017; 2018; 2019; 2020; 2021; 2022; 2023; 2024; 2025; 2026; 2027; 2028; 2029; 2030; 2031; 2032; 2033; 2034; 2035; 2036; 2037; 2038; 2039; 2040; 2041; 2042; 2043; 2044; 2045; 2046; 2047; 2048; 2049; 2050; 2051; 2052; 2053; 2054; 2055; 2056; 2057; 2058; 2059; 2060; 2061; 2062; 2063; 2064; 2065; 2066; 2067; 2068; 2069; 2070; 2071; 2072; 2073; 2074; 2075; 2076; 2077; 2078; 2079; 2080; 2081; 2082; 2083; 2084; 2085; 2086; 2087; 2088; 2089; 2090; 2091; 2092; 2093; 2094; 2095; 2096; 2097; 2098; 2099; 2100; 2101; 2102; 2103; 2104; 2105; 2106; 2107; 2108; 2109; 2110; 2111; 2112; 2113; 2114; 2115; 2116; 2117; 2118; 2119; 2120; 2121; 2122; 2123; 2124; 2125; 2126; 2127; 2128; 2129; 2130; 2131; 2132; 2133; 2134; 2135; 2136; 2137; 2138; 2139; 2140; 2141; 2142; 2143; 2144; 2145; 2146; 2147; 2148; 2149; 2150; 2151; 2152; 2153; 2154; 2155; 2156; 2157; 2158; 2159; 2160; 2161; 2162; 2163; 2164; 2165; 2166; 2167; 2168; 2169; 2170; 2171; 2172; 2173; 2174; 2175; 2176; 2177; 2178; 2179; 2180; 2181; 2182; 2183; 2184; 2185; 2186; 2187; 2188; 2189; 2190; 2191; 2192; 2193; 2194; 2195; 2196; 2197; 2198; 2199; 2200; 2201; 2202; 2203; 2204; 2205; 2206; 2207; 2208; 2209; 2210; 2211; 2212; 2213; 2214; 2215; 2216; 2217; 2218; 2219; 2220; 2221; 2222; 2223; 2224; 2225; 2226; 2227; 2228; 2229; 2230; 2231; 2232; 2233; 2234; 2235; 2236; 2237; 2238; 2239; 2240; 2241; 2242; 2243; 2244; 2245; 2246; 2247; 2248; 2249; 2250; 2251; 2252; 2253; 2254; 2255; 2256; 2257; 2258; 2259; 2260; 2261; 2262; 2263; 2264; 2265; 2266; 2267; 2268; 2269; 2270; 2271; 2272; 2273; 2274; 2275; 2276; 2277; 2278; 2279; 2280; 2281; 2282; 2283; 2284; 2285; 2286; 2287; 2288; 2289; 2290; 2291; 2292; 2293; 2294; 2295; 2296; 2297; 2298; 2299; 2300; 2301; 2302; 2303; 2304; 2305; 2306; 2307; 2308; 2309; 2310; 2311; 2312; 2313; 2314; 2315; 2316; 2317; 2318; 2319; 2320; 2321; 2322; 2323; 2324; 2325; 2326; 2327; 2328; 2329; 2330; 2331; 2332; 2333; 2334; 2335; 2336; 2337; 2338; 2339; 2340; 2341; 2342; 2343; 2344; 2345; 2346; 2347; 2348; 2349; 2350; 2351; 2352; 2353; 2354; 2355; 2356; 2357; 2358; 2359; 2360; 2361; 2362; 2363; 2364; 2365; 2366; 2367; 2368; 2369; 2370; 2371; 2372; 2373; 2374; 2375; 2376; 2377; 2378; 2379; 2380; 2381; 2382; 2383; 2384; 2385; 2386; 2387; 2388; 2389; 2390; 2391; 2392; 2393; 2394; 2395; 2396; 2397; 2398; 2399; 2400; 2401; 2402; 2403; 2404; 2405; 2406; 2407; 2408; 2409; 2410; 2411; 2412; 2413; 2414; 2415; 2416; 2417; 2418; 2419; 2420; 2421; 2422; 2423; 2424; 2425; 2426; 2427; 2428; 2429; 2430; 2431; 2432; 2433; 2434; 2435; 2436; 2437; 2438; 2439; 2440; 2441; 2442; 2443; 2444; 2445; 2446; 2447; 2448; 2449; 2450; 2451; 2452; 2453; 2454; 2455; 2456; 2457; 2458; 2459; 2460; 2461; 2462; 2463; 2464; 2465; 2466; 2467; 2468; 2469; 2470; 2471; 2472; 2473; 2474; 2475; 2476; 2477; 2478; 2479; 2480; 2481; 2482; 2483; 2484; 2485; 2486; 2487; 2488; 2489; 2490; 2491; 2492; 2493; 2494; 2495; 2496; 2497; 2498; 2499; 2500; 2501; 2502; 2503; 2504; 2505; 2506; 2507; 2508; 2509; 2510; 2511; 2512; 2513; 2514; 2515; 2516; 2517; 2518; 2519; 2520; 2521; 2522; 2523; 2524; 2525; 2526; 2527; 2528; 2529; 2530; 2531; 2532; 2533; 2534; 2535; 2536; 2537; 2538; 2539; 2540; 2541; 2542; 2543; 2544; 2545; 2546; 2547; 2548; 2549; 2550; 2551; 2552; 2553; 2554; 2555; 2556; 2557; 2558; 2559; 2560; 2561; 2562; 2563; 2564; 2565; 2566; 2567; 2568; 2569; 2570; 2571; 2572; 2573; 2574; 2575; 2576; 2577; 2578; 2579; 2580; 2581; 2582; 2583; 2584; 2585; 2586; 2587; 2588; 2589; 2590; 2591; 2

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203 Ill. App. 367; Burdette v. The Chicago Aud. Assn. 166 Ill. App. 188.

The charge in the declaration was general in its terms and the proof offered was of such a character as to raise a presumption of negligence.

Defendant made a motion for a new trial at the close of all the evidence and a motion in arrest of judgment, but no motion was made at the end of plaintiff's case to direct a verdict on the ground of variance. We are of the opinion that the declaration was sufficiently broad in its charges of general negligence to support the declaration. If the attention of the trial court had been called to the fact that the declaration charged specific negligence, it could have easily been corrected upon the trial. Gascoigne v. Metropolitan Elevated Railway Co., 239 Ill. 18; Simmons v. Commonwealth Edison Co., 203 Ill. App. 367; Burdette v. The Chicago Aud. Assn. 166 Ill. App. 188; Chicago City Railway Co. v. Carroll, 206 Ill. 318.

The instruction tendered on behalf of the defendant and which was refused by the court, was an instruction to the effect that "the mere fact, if you find it to be a fact, that the sign struck the plaintiff, is not sufficient to entitle the jury to find the defendant guilty. Before the jury can find the defendant guilty it must appear from the preponderance of the evidence * * * that the defendant was guilty of some negligent act charged in the plaintiff's declaration * * *." In view of the fact that the accident itself raised a presumption of negligence, it was not necessary that the plaintiff prove specific negligence. The happening of the accident itself was sufficient to raise a presumption of general negligence and the refusal of this instruction was not error.

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The change in the decision was General in its terms and the proof offered was of such a character as to raise a presumption of malice.

It is the duty of the jury to weigh the evidence and to reach a verdict on the basis of the evidence as presented to them. It is the duty of the jury to weigh the evidence and to reach a verdict on the basis of the evidence as presented to them.

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the indictment returned on behalf of the defendant and which was returned by the court, was an instruction to the jury that "the mere fact, if you find it to be a fact, that the sign on the plaintiff's car was not sufficient to entitle the jury to find the defendant guilty. Before the jury can find the defendant guilty it must appear from the evidence - * * * that the defendant was guilty of some negligence and charged in the indictment." * * *. In view of the fact that the indictment itself stated a presumption of negligence, it was not necessary that the indictment state specific negligence. The happening of the accident itself was sufficient to raise a presumption of general negligence and the return of the indictment was not error.

During the examination of the plaintiff, in answer to a question propounded, she volunteered the information that the manager of the defendant company had stated that the sign had fallen on some previous occasion. On motion of counsel for defendant this testimony was stricken out and thereafter a motion was made by counsel for defendant to withdraw a juror and to have the cause continued. This motion was denied. We see no error in this, however, as the error, if any, was cured by the action of the trial court in striking out the evidence. Moreover, it is not error to introduce evidence of prior accidents occurring under the same or similar circumstances as it has a tendency to prove knowledge on the part of the defendant.

The Supreme Court of this state in the case of Moore v. B. D. & C. R. R. Co., 295 Ill. 63, in its opinion, said:

"The rule in relation to the competency of testimony of other accidents is, that where such testimony tends to show the common cause of the accidents to be a dangerous, unsafe thing or condition the evidence as to such accidents is competent, not for the purpose of showing independent acts of negligence but for the limited purpose of showing that the unsafe thing or condition causing the particular accident was the condition or cause common to such independent accidents, and that the frequency of such accidents tends to show knowledge of such condition. (City of Chicago v. Jarvis, 226 Ill. 614; Mobile and Ohio Railroad Co., v. Vallone, 214 id. 134; City of Taylorville v. Stafford, 196 id. 288; City of Bloomington v. Leary, 151 id. 9.)"

To the same effect see Healy v. Chicago City Ry. Co., 160 Ill. App. 7; Petty v. Stebbing, 164 Ill. App. 439.

Objection is made to the giving of a certain hypothetical question to one of the physicians, on the ground that it invaded the province of the jury. The objection to a hypothetical question should be stated with sufficient definiteness to permit its correction by the party asking it. Seiffe v. Seiffe, 267 Ill. App. 33,

There was no conflict in the evidence as to the manner in which plaintiff was injured and, consequently, the question did not invade the province of the jury. It merely called for an

expression of opinion as to whether or not the condition could have resulted from the injury. We do not believe there was reversible error in the question propounded to the witness and the answer responsive thereto.

The sign which caused the injury was a heavy one, it struck plaintiff on the foot and knocked her down. Plaintiff was taken to the hospital and an x-ray taken of her foot. From the hospital plaintiff was taken to her home; she testified her foot was badly swollen, the skin was broken and bleeding and she suffered severe pain; that she applied hot applications and used a lamp and was in bed about three weeks; that whenever she would walk upon it the swelling would appear and her foot was black and blue for two or three months; that the accident happened March 6, 1929, and this condition existed uncontinuously; that she went to her home in northern Michigan and had light treatments and the bone in one of the toes backed into the instep and when walking she frequently had to stop and sit down.

A physician testified that the injury was permanent and that an x-ray picture of the foot showed a fracture line in the third metatarsal at the proximal end.

It is insisted that the judgment of \$3,500 is excessive, indicating prejudice and passion on the part of the jury. The trial court and the jury had an opportunity of seeing the witnesses and hearing the testimony of the attending and other physicians, and we are unable to say that the damages are so excessive as to indicate prejudice on the part of the jury, particularly as the verdict was concurred in by the trial court in entering judgment on the verdict. Injuries very similar to those complained of in this case were held sufficient to sustain a judgment for \$4,000 in the case of C. & A. R. R. Co. v. Walker, 118 Ill. App. 397.

We see no reason for disturbing the judgment of the Superior Court and it is, therefore, affirmed.

NEBEL AND HALL, JJ. CONCUR.

JUDGMENT AFFIRMED.

expression of opinion as to whether or not the condition could have resulted from the injury. He does not believe there was any other injury in the question surrounded in the witness and the answer

The sign which caused the injury was a heavy one, it struck plaintiff on the foot and knocked her down. Plaintiff was taken to the hospital and an x-ray taken of her foot. From the hospital plaintiff was taken to her home; she testified her foot was badly swollen, the skin was broken and bleeding and she suffered severe pain; that she required her medications and used a cast and was in bed about three weeks; that thereafter she could walk upon it the swelling went away and her foot was pink and blue for two or three months; that the medical treatment given her, in this condition caused amputation; that she went to her home in another condition and had light treatment and the pain in and of the foot went into the matter and when walking she frequently had to stop and sit down.

A physician testified that the injury was permanent and that an x-ray picture of the foot showed a fracture line in the distal extremity of the proximal end.

It is insisted that the judgment of \$2,500 is excessive. In making judgment and decision on the part of the jury. The trial court and the jury had an opportunity of seeing the witnesses and hearing the testimony of the medical and other physicians, and we are unable to say that the findings are so excessive as to indicate prejudice on the part of the jury, particularly as the verdict was returned in by the trial court in entering judgment on the verdict. In fact the jury stated in their opinion that in this case we felt justified in making a judgment for \$2,500 in the case of C. A. B. v. C. A. B. BAKER, 120 Ill. App. 307. It was we agreed for reviewing the judgment of the circuit court and it is, therefore, affirmed.

JUDGMENT AFFIRMED.

WILLIAM H. HALL, JR. CLERK.

36217

NATIONAL TEA COMPANY, a Corporation,
Plaintiff-Appellee,

v.

ELGIN, JOLIET AND EASTERN RAILWAY
COMPANY, a Corporation,

Defendant-Appellant.

APPEAL FROM

CIRCUIT COURT.

COOK COUNTY.

270 I.A. 612⁵

Opinion filed March 29, 1933

MR. PRESIDING JUSTICE WILSON DELIVERED THE OPINION OF THE COURT.

Plaintiff recovered a judgment in the Circuit Court of Cook County in the sum of \$750.00 for damages sustained in a collision between plaintiff's truck and a freight train of the defendant. The accident occurred about 9 o'clock in the morning of January 7, 1929, at the intersection of Lincoln Highway and the defendant company's tracks.

At the point where the accident occurred three railroad tracks intersect Lincoln Highway. The first was a track of the Michigan Central about 430 feet north of the defendant's tracks. The second and third tracks were those of the defendant. The distance between these latter two tracks was approximately 39 feet.

The driver of plaintiff's truck testified that as he approached these tracks from the north he was going about 7 or 8 miles an hour. He did not come to a full stop, although there was a sign "Stop" on the highway just north of the track; that as he approached the first track he saw a train standing with the engine close to the highway and that he was thereby prevented from seeing the approach of the train which struck the truck.

This train which struck the truck consisted of an engine, caboose and five cars and was moving in a westerly direction on the defendant's second or southerly track. As has been said this second track was approximately 39 feet beyond the first track on which the

WITNESSES

NATIONAL TRADING COMPANY, a corporation,
Plaintiff-Appellee,

vs.

SEASIDE TRADING COMPANY, a corporation,
Defendant-Appellant.

270 I.A. 615

Opinion filed March 29, 1933

MR. JUSTICE LUTHER NIXON delivered the opinion of the court.

Reaffirmance reversed a judgment in the circuit court of Cook County in the case of SEASIDE TRADING COMPANY vs. NATIONAL TRADING COMPANY, No. 270 I.A. 615, decided January 7, 1933.

The plaintiff recovered a judgment against the defendant company at the intersection of Lincoln Highway and the defendant company's tracks.

At the point where the accident occurred three railroad tracks intersected Lincoln Highway. The first was a track of the defendant company, about 400 feet west of the defendant's tracks. The second and third tracks were those of the defendant. The distance between these latter two tracks was approximately 15 feet.

The driver of plaintiff's truck testified that as he approached these tracks from the north he was going about 7 or 8 miles an hour. He did not come to a full stop, although there was a sign "STOP" on the highway just north of the track; that as he approached the first track he saw a train standing with the engine close to the highway and that he was thereby prevented from seeing the approach of the train until across the track.

This trial which began in 1928 consisted of no other evidence and the case was moving in a westerly direction on the defendant's track as westerly track. As has been said this second track was approximately 15 feet beyond the first track on which the

other train of the defendant was standing. It was a cold day, the temperature being about 10 degrees below zero but it was clear and there was nothing but the standing engine to prevent the truck driver's view of the oncoming train.

The driver of the truck stated that he did not believe the two trains should be headed in the same direction. On the other hand there is testimony to the effect that these were not through tracks, but switch tracks in the yard of the defendant company and that trains operated in either direction upon said tracks. The driver was in the habit of crossing the tracks at this point about twice or three times a week.

A case very similar to the instant case is that of Sowers v. Illinois Cent.R.R. Co., 261 Ill. App. 63. In the case at bar there would have been nothing to prevent the driver of the truck from seeing the oncoming train after he had crossed the first track and passed the standing engine. There would still be approximately 90 feet before the truck would reach the track over which the train was proceeding. Under a somewhat similar situation in the case of Sowers v. Illinois Central R. R. Co., already cited, the court held the driver of the truck was guilty of contributory negligence. While it is true that the question of contributory negligence is one of fact for the jury, nevertheless, where the facts are close special care should be used in the admission or exclusion of evidence. The cause was tried by the court without a jury and while it is a fact that the court is presumed under such circumstances to consider such testimony as is material, nevertheless, there appears from the record to be considerable testimony as to the damages sustained which is not based on facts sufficiently substantial in character to support the amount of the finding which was entered in the cause.

Coleman, a witness, testified as to the value of the truck

other train of the defendant was standing. It was a cold day, the temperature being about 10 degrees below zero but it was clear and there was nothing but the standing engine to prevent the truck driver's view of the oncoming train.

The driver of the truck stated that he did not believe the train would have been nothing to prevent the driver of the truck from seeing the oncoming train after he had crossed the first track and passed the standing engine. There would still be approximately 50 feet before the truck would reach the truck over which the train was proceeding. Under a somewhat similar situation in the case of Barrett v. Illinois Central R. Co., already cited, the court held the driver of the truck was guilty of contributory negligence. While it is true that the position of contributory negligence is one of last resort, nevertheless, where the facts are clear and undisputed, it should be used in the relation or exclusion of evidence. The court said by the court without a jury and while it is a fact that the court is precluded under such circumstances to consider such testimony as is material, nevertheless, there appears from the record to be substantial testimony as to the damages sustained which is not based on facts sufficiently substantiated in character to support the amount of the finding which was entered in the case.

Witness, a witness, testified as to the value of the truck at the time very similar to the instant case is that of Barrett v. Illinois Central R. Co., 221 Ill. App. 33. In the case at bar there would have been nothing to prevent the driver of the truck from seeing the oncoming train after he had crossed the first track and passed the standing engine. There would still be approximately 50 feet before the truck would reach the truck over which the train was proceeding. Under a somewhat similar situation in the case of Barrett v. Illinois Central R. Co., already cited, the court held the driver of the truck was guilty of contributory negligence. While it is true that the position of contributory negligence is one of last resort, nevertheless, where the facts are clear and undisputed, it should be used in the relation or exclusion of evidence. The court said by the court without a jury and while it is a fact that the court is precluded under such circumstances to consider such testimony as is material, nevertheless, there appears from the record to be substantial testimony as to the damages sustained which is not based on facts sufficiently substantiated in character to support the amount of the finding which was entered in the case.

from facts presented to him in a hypothetical question. He had no knowledge of the particular truck and did not know what it would cost to make the repairs and rehabilitate it after the accident and did not make a mechanical inspection of the motor. Over objection on cross examination counsel was precluded from going into detail as to what the various items would cost. The witness had no knowledge as to how far the truck had been run and did not know where the truck was afterwards sold or for how much. His testimony was of such character as to rest entirely upon surmise and conjecture.

Pelikan, a witness for the plaintiff, was permitted to give his opinion as to the value of the body of the truck prior to the accident, based on a hypothetical question. It appears that this truck had been purchased by the plaintiff company from the Consumers Groceries as a second hand truck. The witness Pelikan had no knowledge as to how long it had been used by the Consumers Company prior to its sale to the plaintiff.

Plaintiff's case was based upon damages to the truck. There was no evidence in the record as to the reasonable cost of repairing it.

Witness Kellar testified, "If I remember, \$350.00 was paid for the truck" by his company after the accident. He was also permitted to give his opinion as to its value before the accident although he testified that he had never seen it prior thereto.

In view of the uncertainty as to the damage to the car as shown by the testimony of the witnesses and because the case is very close on the facts, we are of the opinion that the action should be retried and, therefore, the judgment of the Circuit Court is reversed and the cause is remanded for a new trial.

JUDGMENT REVERSED AND CAUSE REMANDED.

HEBEL AND HALL, JJ. CONCUR.

from facts presented to him in a hypothetical question. He had no knowledge of the particular truck and did not know what it would cost to make the repairs and rehabilitate it after the accident and did not make a mechanical inspection of the motor. Every objection as to cross examination counsel was precluded from going into detail as to what the various items would cost. The witness had no knowledge as to how far the truck had been run and did not know where the truck was afterwards sold or for how much. His testimony was of such character as to rest entirely upon surmise and conjecture.

Belkin, a witness for the plaintiff, was permitted to give his opinion as to the value of the body of the truck prior to the accident, based on a hypothetical question. It appears that this truck had been purchased by the plaintiff company from the Government General in a second hand truck. The witness Belkin had no knowledge as to how long it had been used by the Government Company prior to its sale to the plaintiff.

Belkin's case was based upon damages to the truck. There was no evidence in the record as to the reasonable cost of repairing it. Witness Belkin testified, "If I remember, \$20.00 was paid for the truck" by his company after the accident. He was also permitted to give his opinion as to its value before the accident, although he testified that he had never seen it prior thereto.

In view of the uncertainty as to the damage to the car as shown by the testimony of the witnesses and because the case is truly one on the facts, we are of the opinion that the action should be granted and, therefore, the judgment of the Circuit Court is reversed and the cause is remanded for a new trial.

THOMAS H. BRYANT AND CAROL BRYANT.

36611

PROVIDENCE INSTITUTION FOR SAVINGS,
a corporation,

Complainant-Appellee,

v.

MILDRED J. DAVIDSON, et al,

Defendants-Appellants.

INTERLOCUTORY APPEAL

FROM SUPERIOR COURT,

COOK COUNTY.

270 I.A. 613¹

Opinion filed March 29, 1933

MR. PRESIDING JUSTICE WILSON DELIVERED THE OPINION OF THE COURT.

The complainant filed its bill to foreclose a trust deed on the property of the defendants with a prayer for the appointment of a receiver to collect the rents. On November 29, 1932, an order was entered continuing a motion for the appointment of a receiver until November 30, 1932. The order of continuance bore the inscription, "O.K. Wm. B. Berger Solicitor for Anna Augustus." December 2, 1932, an order was entered appointing a receiver. This order recites that "the defendants Anna D. Augustus, Allen Movey, Ida Movey, Abraham Bernstein, Bertha Bernstein, being represented in court by W. B. Berger, their solicitor," etc. December 22, 1932, defendants appeared in court and filed their motion supported by affidavits to vacate the order appointing the receiver. From the affidavits it appears that the attorney, Berger, was unknown to the defendants and was never authorized to appear or accept service. Furthermore, it appears from the affidavits that the complainant well knew where defendants resided and could easily have served notice of the application for a receiver. It nowhere appears that any attempt was made to serve notice of the pendency of the motion of complainants. So far as the record shows these facts are uncontroverted.

The court refused to vacate the order of December 2, appointing a receiver, but entered an order amending that order, from which it appears that the court offered to grant a hearing on the

IN SENATE
 FEBRUARY 22, 1933
 REPORT
 OF THE
 COMMISSIONER OF THE LAND OFFICE
 IN RESPONSE TO A RESOLUTION
 PASSED BY THE SENATE
 JANUARY 10, 1933
 HOUSE OF REPRESENTATIVES
 FEBRUARY 22, 1933
 HOUSE OF REPRESENTATIVES

370 I.A. 613

Opinion filed March 29, 1933

THE COMMISSIONER OF THE LAND OFFICE, IN RESPONSE TO A RESOLUTION PASSED BY THE SENATE JANUARY 10, 1933, HAS THE HONOR TO SUBMIT TO THE SENATE THE FOLLOWING REPORT:

On the property of the State of New York, there are certain lands which are known as the "Lands of the State". These lands are owned by the State of New York, and are held in trust for the people of the State. The lands are situated in various parts of the State, and are of various sizes and shapes. Some of the lands are used for agricultural purposes, while others are used for other purposes. The lands are managed by the Commissioner of the Land Office, who is responsible for the proper use and disposition of the lands.

The Commissioner of the Land Office has the honor to acknowledge the receipt of a letter from the Honorable Mr. [Name], a member of the Senate, dated [Date], in which he requested that the Commissioner of the Land Office should cause to be prepared a report on the lands of the State, and should submit the same to the Senate. The Commissioner of the Land Office has the honor to acknowledge the receipt of the letter, and to state that he has caused the report to be prepared, and that he is now submitting the same to the Senate.

The report contains a detailed description of the lands of the State, and of the manner in which they are managed. It also contains a list of the lands, and of the names of the owners of the lands. The report is divided into two parts. The first part contains a general description of the lands of the State, and of the manner in which they are managed. The second part contains a list of the lands, and of the names of the owners of the lands.

The Commissioner of the Land Office has the honor to state that he believes that the report will be of great value to the Senate, and that he trusts that it will be of great value to the people of the State. He also has the honor to state that he is sure that the Senate will be interested in the report, and that it will be of great value to the people of the State.

The Commissioner of the Land Office has the honor to state that he is sure that the Senate will be interested in the report, and that it will be of great value to the people of the State. He also has the honor to state that he is sure that the Senate will be interested in the report, and that it will be of great value to the people of the State.

question as to whether a receiver should be appointed, but defendants insisted upon their motion to vacate. The defendants not having been served with process nor having entered an appearance, were entitled to notice of the application for the appointment of a receiver. Grabowski v. MacLaskey, 257 Ill. App. 484; Chicago Title & Trust Co. v. Lauletta, 265 Ill. App. 564; Haj v. American Bottle Co. 261 Ill. 362.

The appointment of receivers is an extraordinary proceeding and they should not be appointed except in cases of emergency. Notice should be given where a receivership is applied for unless such notice is excused for some good legal reason. Nathan C. Dow Co. v. Deist, 123 Ill. App. 364.

It is insisted that upon the motion of the defendants to vacate the order the court gave them an opportunity to question the propriety of a receiver and that by making their motion to vacate they submitted that question to the trial court. A reading of the record, however, discloses the fact that an interlocutory appeal from the original order would have been unavailing inasmuch as the order appointing the receiver recited that the defendants were represented by counsel. This order however, as it now appears did not state the true situation, and there was no way to present it to the trial court except by the motion to vacate. By preserving the record this court now has before it on the interlocutory appeal the true situation and we are of the opinion that the trial court erred in entering its order of December 3, 1932. The interlocutory appeal itself was perfected within the time prescribed by statute. No apparent effort was made to produce Berger, who appeared at the original proceeding and O.K'd the order of continuance, for the purpose of showing by him whether or not he had any power to act as attorney for the defendants. Neither the court nor counsel for

question as to whether a receiver should be appointed, but defendants insisted upon their motion to vacate. The defendants not having been served with process not having entered an appearance, were entitled to notice of the application for the appointment of a receiver. Shawmut v. Merchants' Nat. Bk., 104 Ill. App. 484; Chicago Title & Trust Co. v. Bankers' Nat. Bk., 104 Ill. App. 604; Bank v. Merchants' Nat. Bk., 104 Ill. App. 608.

The appointment of receiver is an extraordinary proceeding and it should not be appointed except in cases of emergency. Notice should be given where a receivership is applied for unless such notice is waived for some good legal reason. Wells v. Wells, 104 Ill. App. 104.

It is insisted that when the motion is granted the receiver is appointed and that the court has no right to vacate the property of a receiver and that by making their motion to vacate they admitted that position to the trial court. A reading of the record, however, discloses the fact that an interlocutory appeal was taken from the order appointing the receiver vacated by the defendants were represented by counsel. This order, however, as it now appears did not state the true situation, and there was no way to prevent it from being amended by the motion to vacate. By presenting the second this court now has before it on the interlocutory appeal the true situation and we are of the opinion that the trial court erred in entering its order of December 2, 1933. The interlocutory appeal itself was returned within the time prescribed by statute. No apparent effort was made to produce better, the question of the original proceeding and the order of continuance, for the purpose of showing to the court that it was not proper to set aside the order appointing the receiver. Hence the court was bound to

complainant seem to have been interested. Defendants had a substantial interest inasmuch as they were entitled to the rents from the time of the appointment of the receiver on December 3, until the time they made their motion to vacate on December 23. If they had been notified of the proceeding and appeared in the first instance, the burden would have been upon the complainant to present facts to the chancellor which would have justified him in the appointment. On the motion to vacate, the reverse is true and the burden was upon the defendants to advance reasons why the appointment should be vacated.

For the reasons stated in this opinion the order of December 2, 1932, appointing a receiver is reversed.

ORDER REVERSED.

HEBEL AND MALL, JJ. CONCUR.

complaints seem to have been interested. Netherlands had a business-
 rial interest inasmuch as they were entitled to the profits from the
 time of the appointment of the receiver on December 2, until the
 time they made their action to vacate on December 22. If they had
 been entitled to the proceeds and appeared in the first instance,
 the receiver would have been the principal in person. In
 the situation which would have justified him in the appointment.
 In the matter in vacate, the receiver is now and the duties are upon
 the receiver to return to the receiver the appointment should be
 vacated.

For the reasons stated in this opinion the order of
 December 2, 1934, appointing a receiver is reversed.

ORDER REVERSED.

RECEIVED: JAN 10 1935

35893

HELEN M. LOTT (WILLIAMS), CHARLES H. LOTT,
WALTER J. GREENEBAUM, as Voting Trustee,
M. ERNEST GREENEBAUM, JR., as Voting
Trustee, and CONTINENTAL ILLINOIS BANK &
TRUST COMPANY, a Corporation,

(Plaintiffs) Appellees,

v.

LOTT HOTELS, INCORPORATED, a Corporation,
and FIDELITY AND CASUALTY COMPANY OF
NEW YORK, a Corporation,

(Defendants) Appellants.

APPEAL FROM

SUPERIOR COURT

COOK COUNTY.

270 I.A. 613²

Opinion filed March 29, 1933

MR. JUSTICE HALL DELIVERED THE OPINION OF THE COURT.

By this appeal it is sought to review a judgment of the Superior Court of Cook County dated January 16, 1932, in favor of plaintiffs and against defendants for the sum of \$5,000 and costs of suit.

The suit is brought on an injunction bond given by defendant on October 18, 1927, in a proceeding by defendant against plaintiff and others wherein plaintiff was enjoined from transferring or permitting to be transferred certain voting trust certificates of stock in Lott Hotels, Incorporated, or the transferring of certain certificates of stock in Lott Hotels, Incorporated, both held in the name of Charles H. Lott.

The declaration alleges that the injunction issued as prayed in the bill; that on October 20th, 1927, the bond sued on herein was filed, and that on July 17, 1931, the injunction was dissolved. The declaration further alleges that Helen M. Lott is the owner of such stock certificates and voting trust certificates; that at the time of the issuing and service of the writ of injunction the stock and voting trust certificates were worth the sum of \$11,600; that because of the injunction, plaintiff was prevented from selling such property, and that the value of the stock and

certificates during the interim between the issuing of the injunction and the dissolution of the same, depreciated in value to nothing, and that plaintiff was compelled to and did pay out the sum of \$5,000 in solicitors fees in procuring the dissolution of the injunction. Defendants filed two pleas, nil-dedit and non-damnificatus. The cause was submitted to a jury, which found for the plaintiff, and assessed plaintiffs' damages at the sum of \$5,000, upon which verdict the judgment appealed from was entered.

There is no evidence in the record that any amount was paid out by plaintiff for attorneys fees as alleged. The questions presented to this court are whether or not under the evidence adduced, the trial court was justified in submitting the case to a jury, and if so, whether there is sufficient material evidence to sustain the verdict. It seems to be admitted by defendants that if there was an actual depreciation in the fair market value of the properties in the interim between the issuing and dissolving of the injunction and the amount of such depreciation is shown by proper evidence, that plaintiff's recovery herein is justified. The ownership by plaintiff/^{Helen M. Lott} of the properties involved is not disputed.

For the plaintiff, over the objection of defendant, one Ferrigo testified that he was the manager of a securities brokerage concern in Chicago; that he had been in the securities brokerage business for 13 years, and that there were sales in the open market of Lott Hotels, Incorporated, stock about October, 1937, and that "the stock is dealt with in units of one share of preferred and a quarter share of common stock." The witness stated that "these units sold between seven and eighteen dollars per unit"; that in November, 1931, there were sales of these units but that sales in the open market six or eight months prior to July, 1931, "I did not know definitely

about." He further testified that there was a sale of a unit at \$3.50 per unit in November, 1931, and that he could give the ask and bid price, ^{and that} ~~and that~~ in July, 1931, there was a nominal bid of \$2.00 per unit at that time, but that he knew nothing of the details of the sale. On cross-examination, this witness testified that he did not know whether any of these sales referred to were closed or not, but that all he knew of the alleged sale was what someone had told him, and that neither the voting trust certificates nor the stock in question were listed on any exchange. On redirect examination, this witness was asked whether or not there was a market for these properties in October, 1927, and in reply he testified that there was a market, but that he did not know of any sales. This witness further stated "the things that passed from seller to buyer in these 1927 transactions were regular stock certificates; that they were not voting trust certificates like these exhibits."

As shown by the record, these voting trust certificates provide that Charles E. Lott is entitled to receive certain shares of preferred stock of Lott Hotels, Incorporated of the par value of \$100 each upon the termination of an agreement mentioned in such certificates; that no stock certificates are to be issued thereunder until an indebtedness of \$3,500,000.00 and interest of Lott Hotels, Incorporated, had been paid.

Perrigo was the only witness produced by the plaintiff upon the question as to whether or not the stocks and voting trust certificates had any value or had depreciated in value in the interim between the issuing and dissolving of the injunction. The defendant moved the trial court to instruct the jury to find the issues for the defendant, which motion was denied, and the instruction tendered was refused. The defendant then produced various stock brokers, ^{that} who testified that they had never sold any of these properties and had no knowledge of any such properties ever having been sold.

about. He further testified that there was a sale of a unit at \$2.50 per unit in November, 1931, and that he would give the sale and that there was a second sale at \$2.50 per unit at that time, but that he knew nothing of the details of the sale. On cross-examination, this witness testified that he did not know whether any of these sales belonged to some group or not, but that all he knew of the alleged sale was that someone had told him, and that neither the voting trust certificates nor the stock in question were listed on any exchange. On redirect examination, this witness was asked whether or not there was a market for these properties in October, 1931, and in reply he testified that there was a market, but that he did not know of any sales. This witness further stated "the things that passed from seller to buyer in these 1931 transactions were regular stock certificates; that they were not voting trust certificates like those which are shown by the record. These voting trust certificates are listed on the New York Stock Exchange and are sold at a value of \$2.50 each upon the termination of an agreement contained in such certificates; that no stock certificates are to be issued thereunder until an indebtedness of \$2,500,000.00 and interest at 6% is paid. In November, 1931, the defendant moved the trial court to instruct the jury to find the issues for the defendant, which motion was denied, and the instruction tendered was refused. The defendant then moved for a new trial, and that the testimony they had never said any of these properties and had no knowledge of any such properties ever having been sold."

In order that she might recover in this action, it was necessary that plaintiff show the fair market value of the properties in question on the date of the injunction, and that during the interim between the granting of the injunction and dissolution thereof, these properties had decreased in their market value. There is not a scintilla of proof in the record as to the value at any time of these voting trust certificates, and proof of only one sale of stock in Lott Hotels, Incorporated, so that there is no evidence in the record to sustain the allegation in the declaration that "at the time of the issuance of said injunction the stock and voting trust certificates described in the bill of complaint and the transfer and/or delivery of which was enjoined, were of the market value of \$11,600, and that at the time of the dissolution of said injunction, the value of said certificates had depreciated to nothing; that the amount due plaintiffs from defendants is \$5,000," or that there is due from defendant to plaintiff any sum whatever.

Upon the evidence adduced, the trial court should have directed a verdict for the defendant. The judgment is reversed and the cause remanded.

REVERSED AND REMANDED.

WILSON, P.J. AND HENDEL, J. CONCUR.

In order that the right answer in this action, it was
properly that plaintiff knew the fair market value of the property
also in question at the time of the acquisition, and that during
the period between the granting of the acquisition and dissolution
interest, these properties had decreased in their market value. There
is not a valuation of property in the record as to the value at any
time at these points, but nevertheless, and that of only one date
of value is left, therefore, it is that there is no evidence
in the record to establish the acquisition in the defendant's favor.
Of the time of the payment of said interest the record and
other facts mentioned hereafter in the bill of complaint and
the evidence and/or testimony of which are referred to in the
market value of \$11,000, and that at the time of the dissolution of
said partnership, the value of said certificates had decreased to
nothing, and the amount due plaintiff's then defendants is \$5,000.
It is shown in the then testimony in plaintiff's favor that
Upon the evidence adduced, the trial court should have

and the cause remanded.

REVEREND AND OBEYED.

WITNESSES: J. L. HARRIS, J. HARRIS.

35903

BERNICE KAPLAN, Administratrix of the
Estate of ABE KAPLAN, Deceased,

(Plaintiff) Appellant,

v.

GUST DEMOS,

(Defendant) Appellee.

12 H
APPEAL FROM

MUNICIPAL COURT

270 I.A. 613³
OF CHICAGO.

Opinion filed March 29, 1933

MR. JUSTICE HALL DELIVERED THE OPINION OF THE COURT.

By this appeal plaintiff seeks to have reviewed a judgment for costs of the Municipal Court of Chicago entered in that court in a suit by Abe Kaplan against defendant on a contract dated January 2nd, 1931, by the terms of which Kaplan, a contractor, agreed to furnish and install in premises belonging to defendant at 814 North Paulina Street, Chicago, certain plumbing, pipes, equipment and fixtures and a steam heating plant, according to specifications made a part of the contract between the parties, for the sum of \$1,800.00. Pending the suit, plaintiff died, and his wife, Bernice Kaplan, ^{administratrix,} was by order of the trial court, substituted as party plaintiff.

In his affidavit of claim, Kaplan alleges that he had completed all the plumbing work provided to be done by the contract, and in addition, had done certain extra work in connection with the plumbing, not provided for in the contract. He also alleges that he had prepared all the heating fixtures, cut pipe and necessary equipment provided for in the specifications, and had delivered them to defendant's premises at 814 North Paulina Street for installation; that on the 7th day of February, 1931, he presented himself with a helper at such place ready to complete the work as provided by the contract, but that defendant refused to allow him to proceed with the work, but ordered him from the premises. He charges defendant

RECEIVED
FEDERAL BUREAU OF INVESTIGATION
U. S. DEPARTMENT OF JUSTICE
WASHINGTON, D. C.

27014-613

Opinion filed March 29, 1933

By this Special Agent it is requested that you have reviewed a letter-
head of the defendant's letter to the United States Marshal at New York
dated in a letter to the United States Marshal at New York dated
January 10, 1933, by the terms of which letter, a contract was
made to furnish and install in premises belonging to defendant
at 111 West 11th Street, New York, certain plumbing, piping,
fixtures and fixtures and a steam heating plant, according to
specifications made a part of the contract between the parties, for
the sum of \$1,000.00. Finding the said specifications and the
specifications were in effect at the trial court, defendant
as party defendant.

In his affidavit of claim, caption alleges that he had
completed all the plumbing work provided for by the contract,
and in addition, had done certain extra work in connection with the
plumbing, not provided for in the contract. He also alleges that
he had procured all the heating fixtures, cut pipe and necessary
equipment provided for in the specifications, and had delivered them
to defendant's premises at 111 West 11th Street for installation;
that on the 7th day of February, 1933, he presented himself with a
helper at each place ready to complete the work as provided by the
contract, but that defendant refused to allow him to proceed with
the work, but ordered him from the premises. He charges defendant

with the amount of the contract price agreed to be paid for the work, plus \$74.00 for extra work and \$75.00 for attorney's fees, making a total charge of \$1,949.00. Plaintiff gives defendant credit for \$500.00 in cash paid him, and also credits defendant with the amount plaintiff estimates it would cost him to complete the work, or \$588.75, making a total credit of \$1,088.75, and asks a judgment for \$860.25 and costs of suit.

In his affidavit of merits, defendant denies that the plumbing work was completed, or that plaintiff was prepared to or did offer to complete the heating plant, and alleges that according to the contract between the parties defendant was to use union labor on the job; that while he was engaged in the work, plaintiff endeavored to work after union hours and that the representatives of a labor union ordered plaintiff's men off the job and stopped the work; that he, defendant, had nothing to do with stopping the work, and that he was willing that plaintiff should complete it, provided he would do it with union labor and without interruption.

There is no provision in the contract that the work should be performed by union labor. It does provide that the work shall be started January 5th, 1931, but nothing is said as to the time of completion, so that we must presume that the work was to be completed within a reasonable time after January 5th, 1931. Two witnesses for plaintiff testified that the plumbing work agreed to be done was started on January 5th, 1931, and finished on February 8th, 1931. A representative of the Department of Health of the City of Chicago produced the records of that department and testified that an inspection and test was made of certain portions of the plumbing work on January 16th, 1931, and that the work inspected passed the test, and that a final inspection was made on July 16th, 1931, and that the department "passed the job."

It seems to be agreed by both parties that about the

with the amount of the contract price agreed to be paid for the work, plus \$46.00 for extra work and \$75.00 for attorney's fees, making a total charge of \$1,263.00. Plaintiff gives defendant credit for \$200.00 in cash paid him, and also credits defendant with the amount plaintiff estimates it would cost him to complete the work, or \$288.75, making a total credit of \$1,063.75, and takes a judgment for \$200.00 and costs at \$1,263.00.

In his affidavit of merits, defendant denies that the plumbing work was completed, or that plaintiff was prepared to or did offer to complete the heating plant, and alleges that according to the contract between the parties defendant was to use union labor on the job; that while he was engaged in the work, plaintiff refused to work after union hours and that the representatives of a labor union ordered plaintiff's men off the job and stopped the work, and that he, defendant, had nothing to do with stopping the work, and that he was willing that plaintiff should complete it, provided he would do it with union labor and without interruption.

There is no provision in the contract that the work should be performed by union labor. It does provide that the work shall be started January 25, 1931, but nothing is said as to the time of completion, so that we must presume that the work was to be completed within a reasonable time after January 25, 1931. Two witnesses for plaintiff testified that the plumbing work agreed to be done was started on January 25, 1931, and finished on February 25, 1931. A representative of the Department of Health of the City of Chicago produced the records of that department and testified that an inspection and test was made of certain portions of the heating plant on January 25, 1931, and that the work had not been done, and that a final inspection was made on July 1931, and that the department "passed the job."

It seems to be agreed by both parties that about the

middle of January, 1931, because of troubles with labor unions, the work to be done under the contract was stopped.

The Secretary of a Building and Loan Association, which had made a loan to defendant to pay for the work to be done on his building, testified that about the middle of January, 1931, he had paid plaintiff \$500.00 on account; that the parties had been having trouble about the installation of the heating plant, involving union labor, and that he called Kaplan and defendant to his office and told them that unless the work proceeded he would cancel the loan and refuse to pay out any more money. On February 5th, 1931, defendant wrote Kaplan that unless he commenced the heating plant work by Saturday morning, February 7th, 1931, at 9 o'clock, the contract would be null and void, and that he would hold plaintiff liable for "any additional expenditure" he should be put to.

One Kiser, a heating contractor employed by plaintiff, and one Dryfoos, a heating engineer, testified that on February 7th, 1931, they went to defendant's building prepared to begin the work of installing the heating plant, and that defendant informed them that he had made other arrangements and that they should not start on the work, and ordered them to leave the premises.

Frank J. Eucher, the general contractor employed by defendant to do the remodeling of the building in which this plumbing and heating plant work were to be installed, and John M. Arnoldy, a heating engineer, testified that they were at the premises in question on the morning of February 7th, 1931, from 8 o'clock until one in the afternoon, and that neither plaintiff nor any one representing him appeared on the scene.

The question as to whether plaintiff unreasonably delayed the work contracted to be done was submitted to the court. Defendant

middle of January, 1931, because of troubles with labor unions, the work to be done under the contract was stopped.

The necessity of a building and loan association, which had made a loan to defendant to pay for the work to be done on his building, testified that about the middle of January, 1931, he had sold plaintiff \$2000.00 on account; that the parties had been having trouble about the location of the heating plant, installation

was made, and that he called Kaplan and defendant to his office and told them that unless the work proceeded he would cancel the loan and refuse to pay out any more money. On February 5th, 1931,

defendant wrote Kaplan that unless he commenced the heating plant work by February 10th, 1931, at 5 o'clock, the contract would be null and void, and that he would hold plaintiff liable for any additional expenditures he should be put to.

On March 1, 1931, a heating engineer employed by plaintiff, and one witness, a heating engineer, testified that on February 7th, 1931, they went to defendant's building; prepared to begin the work of installing the heating plant, and that defendant informed them that

he had made other arrangements and that they should not start on the work, and ordered them to leave the premises.

From 1. March, the general contractor employed by defendant to do the remodeling of the building in which this heating and heating plant work were to be installed, and John W. Kennedy,

a heating engineer, testified that they were at the premises in question on the morning of February 7th, 1931, from 8 o'clock until noon in the afternoon, and that neither plaintiff nor any one there

asked the question as to whether plaintiff was reasonably delayed. The case was referred to the court. Defendant

was threatened with the cancellation of the loan with which he was to pay for it. Whatever the cause of the delay may have been, it could not be said to have been the fault of defendant, who, as the record shows, finally had the heating plant installed - work which defendant was to have performed under his contract - at a cost to defendant of \$1100.00. Defendant notified Kaplan that unless he began the work by a certain time, he would have it done elsewhere. Plaintiff's witnesses testified that they were on hand ready to complete the work at the time fixed by defendant.

Defendant's witnesses testified that they were not, and the record shows that plaintiff never completed the work agreed to be done. The trial court saw and heard the witnesses, and the record shows that he told those who testified for plaintiff, in open court, that they were not telling the truth on this vital and material question.

We see no reason for disturbing the finding of the court, and the judgment of the Municipal Court of Chicago is affirmed.

AFFIRMED.

WILSON, P.J. AND REBEL, J. CONCUR.

was threatened with the cancellation of the loan with which he was
to pay for it. Whatever the cause of the delay may have been, it
could not be said to have been the fault of defendant, who, as
the record shows, finally had the necessary plant installed - with
which defendant was to have performed under his contract - at a
cost to defendant of \$1100.00. Defendant notified Kaplan that
unless he began the work by a certain time, he would have to come
elsewhere. Defendant's witnesses testified that they were on hand
ready to complete the work at the time fixed by defendant.
Defendant's witnesses testified that they were not, and the court
found that defendant never completed the work agreed to be done.
The total amount due and unpaid was \$1100.00, and the record shows
that it was the intention of defendant to pay the same, that
they were not selling the truck on this trial and material question.
There was no reason for disturbing the finding of the court,
and the judgment of the District Court at Chicago is affirmed.

ATTORNEY

WILLIAM F. HARRIS, JR., CHICAGO

35922

CITY OF CHICAGO,

Plaintiff, Appellee,

v.

SAMUEL GLAUBACH,

Defendant, Appellant.

13
1
APPEAL FROM

MUNICIPAL COURT

OF CHICAGO.

270 I.A. 613⁴

Opinion filed March 29, 1933

MR. JUSTICE HALL DELIVERED THE OPINION OF THE COURT.

This is an appeal from a judgment of the Municipal Court of Chicago entered in a proceeding wherein defendant is charged with assaulting one Ruth Didon in violation of Section 4210 of the Chicago Municipal Code. The case was tried by the court without a jury. The court found the defendant guilty as charged and assessed a fine of \$10.00 and costs.

This case has been consolidated with No. 35952, and for the reasons expressed in that case, the judgment is affirmed.

AFFIRMED.

WILSON, P.J. AND NEBEL, J. CONCUR.

APPEAR FROM

MINISTERIAL COURT

OF CHICAGO

270 I.A. 613

Opinion filed March 29, 1933

MR. JUSTICE WILL DELIVERED THE OPINION OF THE COURT.

THIS IS AN APPEAL FROM A JUDGMENT OF THE MINISTRIAL COURT

AT CHICAGO ENTERED IN A PROCEEDING BEARING NO. 25032.

THE APPEALING PARTY ALLEGES THAT THE JUDGMENT IS

THE CHICAGO MUNICIPAL CODE. THE CASE WAS TRIED BY THE COURT WITHOUT

A JURY. THE COURT FOUND THE DEFENDANT GUILTY AS CHARGED AND

IMPOSED A FINE OF \$10.00 AND COSTS.

THIS CASE HAS BEEN CONSOLIDATED WITH NO. 25033, AND

FOR THE REASONS SET FORTH IN THAT CASE, THE JUDGMENT IS AFFIRMED.

1933.

WILLIAM T. L. HARRIS, J. HARRIS.

35931

HAZEL WHITTAKER,

Appellee,

v.

CENTRAL TRUST COMPANY OF ILLINOIS,
a Corp. and ETTA SURKIN,

Appellant.

APPEAL FROM

MUNICIPAL COURT

COOK COUNTY.

270 I.A. 614¹

Opinion filed March 29, 1933

MR. JUSTICE HALL DELIVERED THE OPINION OF THE COURT.

By this appeal this court is asked to review a judgment of the Municipal Court in a suit by plaintiff against Central Trust Company of Illinois and Etta Surkin, defendants, in which plaintiff alleges that she suffered injury to her person because of the negligence of defendants. The cause was tried by the court without a jury, which found the defendants guilty and assessed plaintiff's damages at the sum of \$900.00, and entered judgment on the finding. The Central Trust Company of Illinois alone prosecutes this appeal.

On the 28th day of August, 1928, a document called a "trust agreement" was executed by the Bank of America, as trustee, and Harry Surkin and Etta Surkin, as beneficiaries, in which it is recited "that the Bank of America as trustee is about to take title", to certain real estate, describing it; "that when it has taken the title thereto, it will hold it for the uses and purposes and upon the trusts herein set forth," and that "Harry Surkin shall be entitled to the earnings, avails and proceeds of said real estate". Neither by this instrument, nor by any other document appearing in the record, is there any conveyance made to the trustee of the property described. It is provided by this instrument that all the earnings, avails and proceeds of the property shall belong to the beneficiaries; that the management, control, selling, renting and handling of the property shall remain with the beneficiaries, and that the trustee shall not

280 I.A. 614

Opinion filed March 28, 1933

MR. JUSTICE HALL DELIVERED THE OPINION OF THE COURT.

This appeal is taken from a judgment

of the Municipal Court in a suit by appellants against appellees

Trust Company of Illinois and Mrs. Gurnea, defendants, in which

appellees alleged that the plaintiff is not entitled to the

plaintiff is defendant. The facts are that by the will of

the testator, the defendant Gurnea and her husband

of the sum of \$100,000, and certain judgments on the finding.

The Trust Company of Illinois alone prosecuted this appeal.

On the 28th day of August, 1932, a document called a

"trust agreement" was executed by the Bank of America, as trustee,

and Harry Gurnea and Mrs. Gurnea, as beneficiaries, in which it is

recited "that the Bank of America as trustee is about to take title"

to certain real estate, describing it; "that when it has taken the

title thereto, it will hold it for the use and purpose and upon

the trusts herein set forth," and that "Harry Gurnea shall be entitled

to the earnings, avails and proceeds of said real estate". Neither

by this instrument, nor by any other document appearing in the record,

is there any conveyance made to the trustee of the property described.

It is provided by this instrument that all the earnings, avails and

proceeds of the property shall belong to the beneficiaries; that

the management, control, selling, renting and handling of the property

shall remain with the beneficiaries, and that the trustee shall not

be called upon to do anything in the management of the property. By the consolidation of the Bank of America with the Central Trust Company of Illinois, the latter succeeded to whatever obligations the Bank of America assumed under this instrument.

It is claimed by plaintiff that by reason of this so-called trust arrangement, the Central Trust Company of Illinois, together with L. L. and M. H. Balch and Ella Surkin "each individually or jointly owned, possessed and either directly or indirectly managed, contracted and had the leasing" of the building on the land described in this "trust agreement", and that plaintiff who was a tenant occupying an apartment in a building on such premises, was injured through the negligence of defendants. Balch and Balch, who seem to have been renting agents, were dismissed from the suit.

We find nothing in the record to indicate that the defendant, Central Trust Company of Illinois, had the possession of, or the right of the possession to or any control over the property in question from which it can be held that a duty was imposed upon the Central Trust Company of Illinois with regard to the matter upon which the charge of negligence herein is based.

It is, therefore, ordered that the judgment be reversed
the cause
and/remanded for a new trial,

REVERSED AND REMANDED.

WILSON, F.J. AND REBEL, J. CONCUR.

be called upon to do anything in the management of the property.

By the consolidation of the Bank of America with the Central

Trust Company of Illinois, the latter succeeded to certain oblig-

tions the Bank of America assumed under this instrument.

It is claimed by plaintiff that by reason of this so-

called trust arrangement, the Central Trust Company of Illinois, to-

gether with A. E. and W. E. Walsh and Miss Larkin "each individually

or jointly owned, possessed and either directly or indirectly man-

aged, controlled and had the leasing of the building on the last

mentioned in this "trust agreement", and that plaintiff who was a

tenant occupying an apartment in a building on such premises, was

injured through the negligence of defendants. Walsh and Larkin,

who were at that time residing separately, with defendant from the date

to this writing in the record so indicates that the

defendant, Central Trust Company of Illinois, had the possession of

at the time of the transaction or of any contract over the property

in question from which it can be held that a duty was imposed upon

the Central Trust Company of Illinois with regard to the matter

upon which the charge of negligence herein is based.

If so, therefore, ordered that the judgment be reversed

the cause and remanded for a new trial.

WITNESSED my hand and seal this 11th day of

WILSON, J. A. AND HENRY, J. JUDGE

35953

CITY OF CHICAGO,

Plaintiff, Appellee,

v.

SAMUEL GLAUBACH,

Defendant, Appellant.

APPEAL FROM

MUNICIPAL COURT

OF CHICAGO.

270 I.A. 614²

Opinion filed March 29, 1933

MR. JUSTICE HALL DELIVERED THE OPINION OF THE COURT.

This is an appeal from a judgment of the Municipal Court of Chicago entered in a proceeding wherein defendant is charged with assaulting one Margelat Dunne in violation of Section 4810 of the Chicago Municipal Code. The case was tried by the court without a jury. The court found the defendant guilty as charged and assessed a fine of \$10.00 and costs.

The record discloses that there was considerable contrariety of testimony as to whether the alleged assault was committed or not. Two witnesses, one the complaining witness in this case, the other her sister, testified that the defendant, without provocation, assaulted both of these witnesses. This was denied by the defendant. A woman employee of defendant testified that she did not see the assault, or hear any controversy.

The court heard and saw the witnesses and we find nothing in the record which would justify this court in reversing the judgment of the trial court. The judgment is, therefore, affirmed.

AFFIRMED.

WILSON, P.J. AND NEBEL, J. CONCURS.

CITY OF CHICAGO

CLERK OF THE COURT

7

COUNTY CLERK

CHICAGO, ILLINOIS

CHICAGO, ILLINOIS

Opinion filed March 29, 1933

2801 A. 108

MR. JUSTICE HALL DELIVERED THE OPINION OF THE COURT.

This is an appeal from a judgment of the Municipal Court

of Chicago entered in a proceeding wherein defendant is charged

with possession and control of a certain amount of money

at the Chicago Municipal Court. The case was tried by the court

without a jury. The court found the defendant guilty as charged

and sentenced a fine of \$10.00 and costs.

The record discloses that there was considerable con-

flict of testimony as to whether the alleged amount was

received or not. Two witnesses, one for each side, testified

that on the other day witness testified that the defendant

without objection, admitted both of these witnesses. This was

admitted by the defendant. A woman employee of defendant testified

that she did not see the amount, or have any conversation.

The court found that the defendant had no live witness

in the record which would justify this court in reversing the

judgment of the trial court. The judgment is, therefore, affirmed.

ATTORNEY.

WILSON, T. J. AND HENRI, J. COUNSELLORS.

36484

THE PRUDENTIAL INSURANCE COMPANY OF
AMERICA, a Corporation,

(Complainant) Appellee,

v.

SAMUEL J. RICHMAN, et al,

(Defendants),

On Appeal of
DANIEL G. MARKS and BERNIE RICHMAN,
(Defendants) Appellants.

INTERLOCUTORY APPEAL

FROM SUPERIOR COURT

COOK COUNTY.

270 I.A. 614³

Opinion filed March 29, 1933

MR. JUSTICE HALL DELIVERED THE OPINION OF THE COURT.

This is an interlocutory appeal from an order of the Superior Court of Cook County appointing a receiver in a proceeding to foreclose a mortgage on real estate described in the bill. The property is improved with a three story brick apartment and store building. The complainant is the mortgagee, and the defendants appealing hold title to the premises by means conveyances from Richman, the mortgagor.

The bill recites that defendant, Samuel J. Richman, on the 29th day of July, 1935, as evidence of an indebtedness of \$150,000.00, executed a promissory note payable to the complainant, such note to bear interest at the rate of 5½% per annum, payable semi-annually on the 29th day of January and July of each succeeding year. It is also provided that periodical installments of \$7,500.00 each should be paid on the principal in 18, 30, 42, 54, 66, 78, 90, 102 and 114 months after the date of the note. The bill further recites that on the date of the note, to secure its payment, defendant, Richman, conveyed the premises described in the bill, together with the rents, issues and profits thereon, to the complainant for the uses and purposes described in the mortgage deed, and subject to certain conditions of defeasance in the mortgage;

THE INDUSTRIAL LABORERS UNION OF
AMERICA, a corporation,

(Complainant),

v.

CHARLES E. RICHMAN, et al.,

(Defendants).

in and of the County of

San Francisco, State of California,

(Plaintiff),

Opinion filed March 29, 1933

MR. JUSTICE HALL delivered the opinion of the court.

This is an involuntary appeal from an order of the

Superior Court of San Francisco appointing a receiver in a proceeding

to enforce a mortgage on real estate described in the bill. The

property is improved with a three story brick apartment and store

building. The complainant is the mortgagee, and the defendants

are claiming title to the premises by means conveyed from

Richman, the mortgagee.

The bill recites that defendant, Samuel E. Richman, on

the 25th day of July, 1928, an evidence of an indebtedness of

\$100,000.00, executed a promissory note payable to the complainant,

such note to bear interest at the rate of 8% per annum, payable

semi-annually on the 25th day of January and July of each succeeding

year. It is also provided that periodic installments of \$7,500.00

each should be paid on the principal in 12, 30, 42, 54, 66, 78,

90, 102 and 114 months after the date of the note. The bill further

recites that on the date of the note, to secure its payment, defendant

sent, Richman, conveyed the premises described in the bill,

together with the rents, issues and profits thereon, to the

complainant. The bill also recites that the mortgage was

not subject to any other condition of defeasance in the mortgage.

2801 A. 614

EXHIBITORY A-1

FROM SUPERIOR COURT

SAN FRANCISCO

that the mortgage provides that the grantor will release all right of possession to the premises described in case of default in any of the covenants of the mortgage, among them being an agreement to pay all general taxes and special assessments levied against the property, and to keep the building and fixtures thereon insured against loss or damage by fire. It is further alleged in the bill that defendants were in default in the payment of principal and interest, and for taxes and special assessments levied against the property, agreed to be paid by the mortgagor but ^{largely} paid by complainant, in a sum totaling upwards of \$130,000.00, and that at the time of filing the bill, the fair and reasonable value of the mortgaged premises was \$100,000.00. The bill is sworn to.

On July 16th, 1932, the cause was referred to a Master in Chancery to take testimony only with reference to the value of the premises and the rents, issues and profits derived therefrom. Defendants, (appellants) by a sworn answer filed subsequent to the reference, denied all the allegations in the bill except the execution of the note and mortgage, which they neither admitted nor denied.

On the 22nd day of September, 1932, the Master to whom the cause was referred filed his report by which it is shown that testimony was taken before him on the question of the value of the mortgaged premises, including proof of rentals paid and the rental value of the property, the kind and character of construction of the building. Also evidence was received as to the surroundings of said premises, and the character and kind of transportation thereto. Witnesses were produced both by complainant and defendants.

On September 22nd, 1932, the Master reported that "from an examination of all the testimony of all the witnesses, the Master finds and concludes that the present value of the premises described in the bill of complaint is the sum of \$106,450.00." Extensive

in the bill of complaint as the sum of \$100,000.00. Testimony was taken before him on the question of the value of the property, including proof of rents paid and the rental value of the property, the kind and character of construction of the building. Also evidence was received as to the surroundings of said property, and the character and kind of neighborhood thereabout. Testimony was produced both by complainant and defendant. On the 22nd day of September, 1930, the Master so found the value of the property, which was valued at \$100,000.00. On July 15th, 1932, the same was referred to a Master in equity to take testimony only with reference to the value of the property and the rents, issues and profits derived therefrom. He returned (apparently) by a return which filed subsequent to the return, denied all the allegations in the bill except the amount claimed in the bill, the fair and reasonable value of the mortgaged premises was \$100,000.00. The bill is sworn to.

objections were presented to the Master's report, but were overruled, and the report was ordered filed. Exceptions were presented to the trial court with the stipulation that the objections filed before the Master should stand as exceptions to his report.

After a hearing, the court entered the following order:

"This matter coming on to be heard upon the application of the complainant, by its solicitors, for the appointment of a receiver for the premises described in the bill of complaint and said matter having heretofore been referred to Master in Chancery Louis J. Behan, on a special reference to ascertain and report the present value of and the rents derived from said property, and the court having received and considered said report and the exceptions and objections heretofore filed thereto by certain defendants, and the court having heard the arguments and statements of the solicitors for the complainant and said defendants, and being fully advised in the premises, Both Find that a receiver should be appointed for said premises, and it is therefore Ordered, Adjudged and Decreed that the objections and exceptions to said Master's report be and the same are hereby overruled; that Logan P. Mullins of Chicago be and he is hereby appointed receiver for said premises described with all the usual and customary powers and authority of receivers in equity; that said receiver enter into a bond with surety in the penal sum of \$15,000; that complainant shall enter into a complainant's bond in the penal sum of \$500; that the costs and fees of said Master in Chancery in the sum of \$182.50 be and the same are hereby approved and taxed as costs to be paid by said defendants, to which order the defendants Daniel G. Marks and Bessie Richman except."

One of the errors urged by appellants is that the court erred in neither approving the Master's report, nor making a finding of fact on which to base its order. We are of the opinion that, while informal, the order of the court meets the objection made by counsel, although it does not in terms approve the Master's report. The objection that there is no finding of fact in the order is met by the rule stated by this court in Central Trust Co., v. McGurn, 257 Ill. App. 45, page 53, as follows:

"The general rule in chancery is that where the evidence is preserved in the record, the facts need not be found in the order or decree but reference may be had to the evidence to ascertain whether it sustains the order or decree. Hilenski v. Roman, 291 Ill. 543. It is certain that there is nothing in the statute that prevents such reference."

All the evidence taken before the Master and included in his report, is included in and is a part of the record of the cause in this court. The question as to whether the court was in error in taxing the costs as it did in the order appealed from, is not reviewable in this interlocutory appeal. That is a matter to be disposed of by the court in its final decree.

"The appointment of a receiver is not the ultimate end and object of the suit, but is merely ancillary thereto, and rests in the sound discretion of the court. In such cases, appellate courts will not interfere with the course being pursued by the trial court, except where it is clear that the justice of the case requires it."

St. Louis, Vandalia & T. M. R. R. Co., v. Vandalia, 103 Ill. App. 382, page 368.

After a careful examination of the record, the court concludes that the trial court did not exceed its discretion in appointing a receiver in this case, and in that respect, the order is affirmed.

AFFIRMED.

WILSON, F.J. AND NEBEL, J. CONCUR.

35117

LOUIS SOLOMON, Administrator of
the Estate of Paul Solomon,
Deceased,

Appellant,

v.

GEORGE W. WEAD and the Woodlawn
Trust and Savings Bank, a
Corporation, Trustee, Impleaded
with H. M. Marsh,

Appellees.

APPEAL FROM

CIRCUIT COURT

COOK COUNTY.

270 I.A. 614⁴

Opinion filed March 29, 1933

MR. JUSTICE REBEL DELIVERED THE OPINION OF THE COURT
ON REHEARING.

This cause is again before us on a rehearing granted.
After further consideration we adhere to the original opinion.

The demurrer of the defendants to the original declaration, consisting of eight counts, and to the first, second and third additional counts, as amended, was sustained, and the plaintiff elected to stand by his pleading. The cause was thereupon dismissed by the court at plaintiff's costs. Upon appeal of the plaintiff the case is now in the Appellate Court for review.

The plaintiff alleges that the defendants owned and operated an old abandoned stone quarry on land between 91st and 93rd streets, east of Stony Island Avenue, in a populous territory in the City of Chicago, in which water collected to a depth of about 14 feet, and in which the defendants permitted, encouraged and invited the general public to swim; and allowed and permitted abandoned automobiles to be in said water, forming a hidden trap and menace to life and limb of plaintiff's intestate and other members of the general public who might swim in said pond or body of water; that plaintiff's intestate, a boy 16 years of age, and an excellent swimmer, on July 4, 1929, while swimming there, struck and came

222

It is requested that you
consider this in your
report.

• **Disadvantages:**

4.

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The summary of the defendant's to the original hearing

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you have a butterfly in the color of silver, green, all

OF HOUSES HAS BEEN ABOLISHED & PAINTED, AND THE BIRD IS NOT OF COURSE

THE UNIVERSITY OF CHICAGO

and prefer to shed a large flow of slow moving, warm

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in contact with hidden automobiles which were negligently allowed and permitted by the defendants to remain in said water, and as a result thereof was rendered unconscious and was drowned.

The original declaration consists of eight counts, alleging in part as follows:

In the first count it is alleged that the defendants owed a duty to use care and caution in keeping the premises in a safe condition for anyone who was swimming, and that the defendants carelessly and negligently permitted old automobiles to remain partly submerged in the water.

In the second count it is alleged that it was an attractive nuisance to children and others who cared to swim.

In the third count the allegation is against only one defendant, George W. Wead, and sought to impose a duty on him to keep the premises safe for those who might want to swim, but that he did carelessly permit it to remain in an unsafe condition on account of the submerged abandoned automobiles.

The fourth count is the same as the third, except that the allegations are made only against the defendant, Woodlawn Trust and Savings Bank, as trustee.

The fifth count is also similar to the third, but the allegation is only against the defendant H. W. Marsh.

In the sixth count only the defendant George W. Wead is named and therein he was charged with the duty to keep the premises in a safe condition with due regard to the safety of the general public, but that he carelessly permitted the submerged, abandoned automobiles to remain therein, all of which formed an attractive nuisance as to plaintiff's intestate and other children.

The seventh and eighth counts are similar to the sixth count, except that in the seventh count only the Woodlawn Trust & Savings Bank, a corporation, as trustee, was named, and in the

In contrast with latter automobiles which were exclusively licensed and permitted by the Government to remain in this country, and as a result thereof was rendered unnecessary and was abandoned.

The original decision consisted of eight counts, although in part as follows:

In the first count it is alleged that the defendant was a duty to use force and caution in keeping the premises in a safe condition for anyone who was entering, and that the defendant carelessly and negligently permitted all automobiles to remain parked on the premises in the street.

In the second count it is alleged that it was an attempt to cause damage to the premises and to the cars parked there.

In the third count the allegation is against only one defendant, George A. Ward, and sought to impose a duty on him to keep the premises safe for those who might want to enter, but that he did carelessly permit it to remain in an unsafe condition on account of the numerous abandoned automobiles.

The fourth count is the same as the third, except that the allegations are made only against the defendant, Woodrow Ward and Savings Bank, as tenants.

The fifth count is also similar to the third, but the allegation is only against the defendant R. V. Ward.

In the sixth count only the defendant George A. Ward is named and therein he was charged with the duty to keep the premises in a safe condition with due regard to the safety of the general public, but that he carelessly permitted the numerous, abandoned automobiles to remain therein, all of which caused an obstruction to the traffic of the street and great damage.

The seventh and eighth counts are similar to the sixth count, except that in the seventh count only the defendant Ward & Savings Bank, a corporation, as tenants, was named, and in the

eighth count, only the defendant H. W. Marsh.

The allegations of the second additional first and second counts as amended are hereinafter fully set forth.

In the second additional third count as amended it is alleged that the defendants willfully and wantonly neglected to clean out the pond or to fence it, and invited the public to swim therein, by reason whereof plaintiff's intestate was drowned.

After the demurrer to the amended additional counts was sustained, the defendants sought leave to withdraw their pleas to the original declaration consisting of eight counts and file a demurrer thereto, to which motion plaintiff objected, because the statute of limitations had run and the plaintiff would be prejudiced thereby. The motion was denied.

Thereafter, on March 7, 1931, the defendants' demurrer to the second amended additional three counts was heard and sustained, and thereupon the defendants renewed their motion to withdraw their pleas to the original declaration in order to demur thereto, and the same was granted.

The plaintiff contends that when the owner of private property has permitted its use by the general public over a considerable period of time, and a considerable number of people have availed themselves of such use, the owner of the real estate owes a duty of care for the safety of persons using said property under the existing custom; and that, under the allegations of fact, the court erred in sustaining the defendant's demurrer to the declaration.

The rule has been settled by the weight of authorities, and is announced in the case of City of Pekin v. McMahon, 154 Ill. 141, as follows:

"That the private owner or occupant of land is under no obligation to strangers to place guards around excava-

which went, with the intention of, to make.

The application of the second additional first and

second points is made in the following fully and briefly.

In the second additional first point it is

stated that the defendant willfully and wantonly neglected to

show any due regard to the public in the use of the

premises, by means of the defendant's servants and agents.

After the answer to the second additional point was

submitted, the defendant sought leave to withdraw their plea to

the original declaration consisting of eight counts and this

leave was granted, in which motion the defendant objected, because the

plea of limitation had not been allowed to be withdrawn.

Thereby, the motion was denied.

Thereafter, on March 14, 1901, the defendant's counsel

in the second additional first point was denied and the

plea of limitation was withdrawn and the plea of limitation

was left in the original declaration in order to make thereby

and the same was granted.

The plaintiff contends that when the same is given

thereby has resulted the use of the second point as a condition

of the plea of limitation, and a condition of the plea of

limitation of the plea of limitation, and the plea of limitation

is left in the original declaration in order to make thereby

the plaintiff contend that when the same is given

thereby has resulted the use of the second point as a condition

of the plea of limitation.

The plea was denied by the weight of authorities.

and is contained in the case of WILLIAMS v. WILSON, 1891, 11.

11, on appeal.

That the third point of complaint of the plaintiff is

tions upon his land. The law does not require him to keep his premises in safe condition for the benefit of trespassers, or those who come upon them without invitation either express or implied, and merely to seek their own pleasure or gratify their own curiosity."

However, an exception to this general rule is that liability may result from a dangerous condition of private property lying opposite a highway or frequented path, for public use, upon which the owner or occupant by invitation, either express or implied, induces others to come. The decisions are not entirely harmonious upon this question, but from 36 L. E. A., page 888, it appears from the note of the author that the weight of authority is in favor of the following:

"The owner of private property is not obliged to make it safe for trespassers or even for mere licensees. If, however, the circumstances have been such as to amount to a devotion of the property temporarily to the public use, care must be taken not to make it unsafe until proper notice of the change has been given. Nothing which amounts to a trap can be placed where the public has been in the habit of resorting, and excavations cannot be made so near the line of an existing highway as to render travel on the highway unsafe."

It is also announced as a rule by the Supreme Court of Illinois in the case of Tomle v. Hampton, 129 Ill. 379, that

"where the owner of land invites the public to make use of it, by connecting it with a public sidewalk, he must exercise due care to keep the premises in a reasonably safe condition."

In Bennett v. Railroad Co., 102 U. S. 577, it was said by the court,

"That the owner or occupant of land who, by invitation, express or implied, induces or leads others to come upon his premises, for any lawful purpose, is liable in damages to them, they using due care, for injuries occasioned by the unsafe condition of the land or its approaches, if such condition was known to him and not to them, and was negligently suffered to exist, without timely notice to the public, or to those who were likely to act upon such invitation."

It is essential in order to recover in an action for damages that the person injured shall allege and prove that the

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landowner invited the public either in express terms or by implication, to use the land as a pathway or for amusement purposes. The owner cannot knowingly permit a trap upon the land which may cause injury, without warning the public of the danger. Failing to do so, the owner may be liable to a person rightfully upon the premises, who, in the exercise of due care, was injured as a result of a trap maintained or permitted upon the land by the owner. However, there are cases where the owner may be liable even to a trespasser or licensee for injuries caused by wanton or wilful acts in setting spring traps or instruments of destruction on his land for defense of his property without notice of such contrivances. The question is, is an owner guilty of negligence in failing to erect a fence which is required by a city ordinance around a large hole or pit, so as to prevent injuries to persons who are on the land by invitation, expressed or implied, themselves using due care. The general rule is that a violation of a statute is prima facie evidence of negligence. This is also true as to the violation of a city ordinance, where the ordinance is such as the city is authorized by its charter, or by statute, to make. In Channaco. v. Mahn, 189 Ill. 28, it was held in an action by an employee for injuries received from falling down an open elevator shaft, proof of the defendant's violation of a city ordinance requiring all persons controlling passenger or freight elevators in buildings to employ some person to take charge of and operate the same, constitutes a prima facie case of negligence, if such violation caused or contributed to the injury. The nonperformance of this duty imposed by statute or ordinance is a breach of duty to the public, and therefore evidence of negligence and liability if the injuries were the result of such violation of duty. It has been suggested in this case that the failure of an owner to enclose a pit or excavation by a fence is not the proximate cause that resulted in injury to the person on

the land. If the injury is the result of the injured party's own negligence, failure to erect the fence necessarily would not be the proximate cause of the injury. Whether or not the absence of a fence constitutes negligence was for the jury, under all the facts and circumstances in evidence.

It appears from the pleadings of the plaintiff in the second additional first count as amended that the defendants owned, operated and controlled the premises located in a populous section of the City of Chicago, on Stony Island Avenue at 93rd Street; that within 50 feet of the cement driveway and walk on Stony Island Avenue, and within 3 feet of 93rd street, there was kept and maintained a body of water as a public swimming place, used daily by many people and open to the public use. No fence was erected around said body of water and no signs of warning were near said pond to tell of its great depth or to tell of its hidden dangers; that the pond was used as a dumping place for abandoned automobiles, which endangered the lives of people swimming there; that there was also permitted in the water a stone slide, which was used for many years by the Stony Island Quarry, and which was a menace to the public using said water as a swimming place; that the defendants maintained the swimming place openly over a period from March 19, 1925 to July 4, 1929, and were continuously warned and admonished by the City of Chicago authorities to fence said pond in compliance with a certain City ordinance, or to clear out of the pond the abandoned automobiles and heavy objects allowed by the defendants to float in the water; that the defendants ignored said warning, and made no attempt to make the premises safe, although they were informed by the City authorities and citizens who lived in the neighborhood that there were many persons drowned there by reason of being struck by the articles floating in the water; that they did not make any attempt to prevent or prohibit swimming, or to make the

place free from hidden dangers, but allowed and impliedly invited the public to swim in said pond; that the plaintiff's intestate was a boy of the age of 16 years; that he entered the water and started to swim when his head was struck by a sunken automobile or heavy object; that his head was badly bruised, and he sank and was drowned.

The second additional count as amended, in addition to certain allegations of fact, alleged the violation of a certain ordinance by the defendants in failing to fence said pond; that they permitted the clay hole or excavation to be kept open and exposed to the use of the general public for swimming purposes; that the plaintiff's intestate entered upon said real estate and pond without being in any way warned, and was struck by a hidden object, rendered unconscious and was drowned. The ordinance is as follows:

"Clay holes and excavations. The owner, lessee or person in possession of any real estate within the city upon which are located or situated any clay holes or other similar excavations, is hereby required to cause such clay holes or other excavations to be enclosed with wooden or wire fences of not less than six feet in height, when such fences are of wire, only smooth or not barbed wire shall be used, and such fence or fences shall consists of not less than eight rows of wire, and such of wire shall not be more than nine inches apart. Any person violating any of the provisions of this section shall be fined not more than two hundred dollars for each offense."

The plaintiff in this count also alleged that the defendants were warned many times by the City authorities to fence the clay hole, but ignored the warnings, and encouraged and invited its use, although they knew that many were killed there as a result of the dangerous condition of the pond. There is also the allegation of the exercise of due care and caution by the plaintiff's intestate.

It is to be noted that the defendant's demurrer admits facts well pleaded, and admits that they knew of the actual condition

place from two sides, but allowed and negligently leaving the hole to exist in said pond; that the plaintiff's interest was a way of the age of 15 years; that he entered the water and started to swim when his head was struck by a wooden outboard or heavy object; that his head was badly bruised, and he sank and was drowned.

The second additional count as amended, in addition to certain allegations of fact, alleged the violation of a statute by the defendant in failing to fence said pond; that they permitted the clay hole or excavation to be kept open and exposed to the use of the general public for swimming purposes; that the plaintiff's interest upon said real estate and pond without being in any way warned, and was struck by a hidden object, rendered unconscious and was drowned. The ordinance is as follows:

"Every owner and possessor of any pond, lake or other body of water, whether public or private, shall cause the same to be enclosed with a fence of sufficient height and strength to prevent any person from entering the same, and shall cause the same to be kept in good repair, and shall cause the same to be kept free from any obstruction, and shall cause the same to be kept free from any accumulation of refuse or other material, and shall cause the same to be kept free from any other thing which may be dangerous to the health or safety of the public. Any person violating any of the provisions of this ordinance shall be fined not more than two hundred dollars for each offense."

The plaintiff in this count also alleged that the defendant with intent and knowledge of the fact that the clay hole, but ignored the warning, and encouraged and invited the use, although they knew that many were killed there as a result of the dangerous condition of the pond. There is also the allegation of the violation of the statute by the plaintiff's interest. It is to be noted that the defendant's disclaimer admits that they were of the actual condition

of the premises in which was included the swimming hole; indeed, admits that they were warned by the City authorities and citizens of the neighborhood that swimming there was dangerous because of the hidden dangers in the water, but failed to take steps to fence the excavation required by the Chicago ordinance,

It is also admitted by the demurrer that the defendants have allowed, encouraged and invited the public to swim in the pond on their premises. This invitation to use the premises for swimming induced the plaintiff's intestate to come upon the premises for a lawful purpose, and while on the premises and in the water the plaintiff was injured, which injury resulted in his death through no fault of his own. Under this state of the pleadings, the plaintiff can maintain an action for the death of his intestate occasioned by the unsafe condition of the land. This condition was known to the defendants and not to the deceased, and they negligently suffered it to exist, without any notice to him, when he took advantage of the defendants' invitation to swim. The failure to erect a fence is not conclusive of liability, but this breach of duty will be evidence of negligence. To erect a fence is a duty imposed by the City Ordinance, and failure of the defendants to do so, as alleged, is a breach of this duty to the public and evidence of negligence for which the defendants are liable if the injuries causing the death of plaintiff's intestate were, in a substantial sense, the result of such violation of duty. If a fence had been built enclosing the pond, as required by the ordinance, we cannot assume that this boy would have climbed over the fence to go in swimming.

Plaintiffs contend that it was an abuse of discretion for the court to allow the defendants to withdraw their several pleas to the original declaration after the expiration of the statutory period of limitation. However, the defendants' argument

of the property in which was included the alleged hotel, and
that they were owned by the City authorities and citizens
at the neighborhood that adjoining there was dangerous because of
the hidden dangers in the water, but failed to take steps to remove
the navigation required by the Chicago ordinance,
it is also admitted by the document that the defendants
have allowed, encouraged and invited the public to swim in the pond
and their children. This invitation is one of the promises for swimming
in the neighborhood's interests to some extent, but the water was
located in the pond, and while in the vicinity of the water was
dangerous and injured, which injury occurred in the pond through
the lack of care. When this state of the neighborhood, the plaintiff
was notified or warned for the duty of his interest necessitated by
the public condition of the pond. This condition was known to the
defendants and not to the deceased, and they negligently suffered it
to exist, without any notice to him, when he took advantage of the
defendants' negligence to swim. The failure to erect a fence is not
negligence of itself, but this breach of duty will be evidence
of negligence. To erect a fence is a duty imposed by the City
ordinance, and failure of the defendants to do so, as alleged, is
a breach of this duty to the public and evidence of negligence to
which the defendant was liable at the instant causing the death
of plaintiff's deceased son, in a substantial sense, the public
at large violation of duty. If a fence had been built enclosing the
pond, as required by the ordinance, no accident would have occurred
which would have killed the child, as he would not have been
allowed to swim there, and it was an act of negligence
the defendant's failure to erect the fence as required by the ordinance
which caused the death of the child, and the defendant's negligence

in reply to this contention is that the rule has been changed by the amendment to Section 39 of the Practice Act, Cahill's St. ch. 110, which permits amendment to a declaration after the limitation period has expired, even though the declaration states no cause of action.

This court in its opinion in the case of Zister v.

Pollack, 263 Ill. App. 170, in construing this section of the act, said:

"It will be noted that the amendment provides that where any pleading is amended, the amendment 'shall be held to relate back to the date of the filing of the original pleading * * * and the cause of action * * * set up in the amended pleading shall not be barred by * * * lapse of time under any statute prescribing or limiting the time within which an action may be brought * * * if the time prescribed or limited had not expired when the original pleading was filed, and if it shall appear from the original and amended pleading that the cause of action asserted * * * in the amended pleading grew out of the same transaction or occurrence, and is substantially the same as set up in the original pleading, even though the original pleading was defective in that it failed to allege the performance of some act or the existence of some fact.'

In the instant case, if we assume that the original declaration did not state a cause of action because it failed to specifically allege the date of the death of the deceased, so that it did not appear that the suit was brought within a year after the death of Anthony M. Zister, yet we are of the opinion that this defect might be cured after the expiration of one year by virtue of this amendment. At most, the original declaration was defective, in that it failed to allege 'the existence of some fact,' viz; the date of the death of the deceased. It is obvious that the 'cause of action asserted in the amended declaration grew out of the same transaction or occurrence and is substantially the same as set up in the original pleading.'"

The plaintiff's contention that the court should not have permitted the defendants to withdraw their pleas and file a demurrer after the statute of limitations had run, was undoubtedly right before Section 39 of the Practice Act was amended. The amendment to Section 39 affords an opportunity to the plaintiff to file an amendment to the declaration, notwithstanding the limitation period had expired; provided that the cause of action asserted in the amendment grew out of the same transaction or occurrence as set up in the original pleading. For the reason indicated, we are of the opinion

This court in its opinion in the case of Winkler v. Collick, 305 Ill. App. 170, is construing this section of the act.

[illegible][illegible]

The plaintiff's contention that the court should not have
advised the defendant to withdraw their plea and file a summary
rather than the statute of limitations had run, was undoubtedly right
because Section 38 of the Practice Act was amended. The amendment to
Section 38 affords an opportunity to the plaintiff to file an
amendment to the declaration, notwithstanding the limitation period
has expired; provided that the cause of action asserted in the amend-
ment grew out of the same transaction or occurrence as set up in the
original pleading. For the reason indicated, we are of the opinion

that the court properly entered the order.

While the order of the court sustained the demurrer to the declaration, it does not appear from the record that a demurrer was filed by the defendants, in compliance with leave granted by the court, or that the plaintiff objected upon that ground. The court will, therefore, consider the questions before us as if raised by a demurrer properly filed. However, for the reasons set forth in this opinion we have reached the conclusion that the trial court erred in sustaining the demurrer to the second additional first and second counts as amended. Therefore, the judgment is reversed and the cause remanded with directions that the court set aside the judgment of dismissal and hold for nought the order sustaining the defendants' demurrer to the second additional first and second counts as amended; that the trial court direct the defendants to plead to said counts within such time as may be fixed by the court, and enter such further and other orders consistent with the views expressed in this opinion.

REVERSED AND REMANDED WITH DIRECTIONS.

WILSON, P. J. SPECIALLY CONCURS.
HALL, J. DID NOT PARTICIPATE.

MR. PRESIDING JUSTICE WILSON SPECIALLY CONCURRING:

I agree with the opinion as above written and concur therein. I have considerable doubt, however, as to the applicability of the ordinance as pleaded in the second additional count as amended.

that the court properly entered the order.

While the order of the court sustained the demurrer to

the declaration, it does not appear from the record that a demurrer was filed by the defendant, in compliance with leave granted by the court, or that the plaintiff objected upon that ground. The

court will, therefore, consider the questions before us as if

raised by a demurrer properly filed. However, for the reasons set

forth in this opinion we have reached the conclusion that the trial

court acted in sustaining the demurrer to the second additional

first and second counts as amended. Therefore, the judgment in

favor of the plaintiff is affirmed with directions that the court set

aside the judgment of dismissal and enter the proper judgment

relating to the defendant's demurrer as the record additional facts

and second counts as amended; that the trial court direct the

defendant to file a bill of particulars within such time as may be fixed

by the court, and enter such further and other orders as may be

just and proper in this matter.

REVEREND JUSTICE OF THE PEACE

WILLIAM F. L. HARRIS, CLERK
CITY OF NEW YORK

IN WITNESS WHEREOF I have hereunto set my hand and seal

I give this the eighth day of June, 1914.

WILLIAM F. L. HARRIS, CLERK

at the conclusion of the trial in the second additional count as

amended.

35890

D. M. KABLE,

Appellant,

v.

CAMERON CAN MACHINERY CO., a
corporation,

Appellee.

APPEAL FROM

CIRCUIT COURT

COOK COUNTY.

270 I.A. 614⁵

Opinion filed March 29, 1933

MR. JUSTICE BEGEL DELIVERED THE OPINION OF THE COURT.

This appeal to the Appellate Court is by the complainant from a decree entered by the Chancellor upon a Master's report, in which decree the court found that there is due the complainant the sum of \$930.39, after sustaining certain exceptions to the Master's report.

The decree is based upon the complainant's bill for an accounting as to the amount due under the provisions of a contract between the complainant and the defendant, bearing date November 2, 1921, and providing that the complainant was to receive commissions for the sale of the products of the defendant in the Far East.

The pertinent provisions bearing upon the questions before this court are as follows:

"(4) The manufacturer will make quotations to the agent at the regular price list, and it is understood that the agent will receive a further discount from these quotations of 10% and 10% on all goods ordered by the agent or the agent's clients."

"(6) As the manufacturer already has certain customers both in China and Japan, and has also export houses in London and New York who are purchasing their can making machinery from the manufacturer and shipping the same into and within the territory referred to in this contract, it is not intended that this agreement shall in any way affect the relations now existing between the manufacturer and his customers."

"(7) However, the manufacturer agrees and hereby promises to compensate the agent on such direct business with a commission of 10% on any sales made with the present customers of said manufacturer, above mentioned, having branch offices either in New York, London, or in the above mentioned territory."

280 I.A. 614

Opinion filed March 29, 1933

THE COURT HEREIN DENIES THE PRAYER OF THE PETITIONER.
This appeal to the Appellate Court is by the complainant
from a decree entered by the Chancellor upon a Master's report, in
which decree the court found that there is due the complainant the
sum of \$100.00, after deducting certain expenses in the Master's
report.

The decree is based upon the complainant's bill for an
accounting as to the amount due under the provisions of a contract
between the complainant and the defendant, bearing date November 1,
1921, and providing that the complainant was to receive commissions
on the sale of the products of the defendant in the Far East.

The pertinent provisions bearing upon the questions before
the court are as follows:

- "(4) The defendant will make payments to the agent
as the various years list, and it is understood that the
agent will receive a further discount upon these payments
of 10% and 15% on all goods ordered by the agent on the
agent's account."
- "(5) It is the understanding already between the parties that
the agent and agent, and the agent's business in London and
New York are purchasing their own making machinery from
the manufacturer and shipping the same here and within the
territory referred to in this contract, it is not intended
that this agreement shall in any way affect the relations now
existing between the manufacturer and his customers."
- "(7) However, the manufacturer agent and hereby promises
to contribute the agent on some direct business with a com-
mission of 10% on all sales made with the present customers
of this manufacturer, above mentioned, having branch offices
situated in New York, London, or in the same manner in any
other place."

The complainant in his brief frankly admits that the questions that arise are principally questions of fact which necessarily involve the credibility of the witnesses and the weight of the evidence, but questions the correctness of the conclusion reached by the court.

One of the points made by the complainant is that a contract which has been reduced to writing cannot be added to or varied by parol or extrinsic evidence, and that said rule was violated by the admission of certain evidence by the court. This rule is so well established that citation of authorities is hardly deemed necessary. An examination of the appellant's brief does not disclose in what particular the court violated the rule contended for in considering the evidence.

The complainant contends that the evidence in the instant case warranted a finding by the Chancellor that a larger amount is due the complainant for commissions than the amount allowed in the decree.

In the Tan Kah Kee & Co., Singapore, S. S. account there is a conflict in the evidence as to whether the account was that of an old customer or of a customer produced through the efforts of the complainant. If this customer was produced by the complainant he would be entitled to a further 10% commission, as provided for by Paragraph 4 of the contract. From an examination of the record we are satisfied that the Chancellor did not err in sustaining the defendant's exceptions to the Master's finding, and that the Chancellors' conclusion was not against the weight of the evidence.

In the Chop Tye Sin Pineapple Factory, Singapore, S. S. account, it appears from the record that commissions were paid to the complainant except as to certain money received by the defendant on this account since the commencement of the suit, and which sum is included in the decree.

The complainant in his brief frankly admits that the questions that arise are principally questions of fact which necessarily involve the credibility of the witnesses and the weight of the evidence, but questions the correctness of the conclusion reached by the court.

One of the points made by the complainant is that a contract which has been reduced to writing cannot be added to or varied by parol or extrinsic evidence, and that said rule was violated by the admission of certain evidence by the court. This rule is so well established that citation of authorities is hardly deemed necessary. In examination of the complainant's brief and decision in this regard the court violated the rule contained in its concluding remarks.

The complainant contends that the evidence in the instant case warranted a finding by the Chancellor that a larger amount is due the complainant for commissions than the amount allowed in the answer.

In the *Lee Koo & Co., Singapore, v. S. S. account there* is a conflict in the evidence as to whether the account was that of an old customer or of a customer produced through the efforts of the complainant. If this customer was produced by the complainant he would be entitled to a larger commission, as provided in paragraph 4 of the contract. From an examination of the record as set forth that the Chancellor did not err in sustaining the defendant's exception to the answer's finding, and that the

complaint is correct in its contention that the defendant's answer was not correct and wrong of the evidence. In the case *the Singapore Press, Singapore, v. S. S. account*, it appears from the facts that commissions were paid to the defendant except as to certain items covered by the defendant on this account since the movement of the bill, and which was included in the answer.

The complainant contends that the amount of the order was to be the basis upon which the commission was to be computed, and that the amount found to be due is erroneous. The Master found that under the terms of the contract the commissions were to be computed upon goods purchased and received by the customer. This is a reasonable construction of the contract, and such construction is supported by the use of such words as "sales made," and "purchasing their can making machinery." These terms mean that the complainant would be entitled to commissions only on sales made to purchasers of "can making machinery," a product of the defendant.

The next contention urged by the complainant is that under the terms of the contract he is entitled to an additional 10% commission on this account, it being a new one. The complainant accepted the 10% commission, which, from the evidence, seems to have been received by him without complaint until a short time before the filing of his bill. The Master's finding is supported by the evidence, and his finding was approved by the decree of the Chancellor, who passed upon the question, and it does not appear from the facts that the finding was erroneous.

In the Morinaga Confectionery Co. Ltd. account the finding of the Master was approved by the Chancellor, and, from the record, it does not appear that his conclusion was objected to by the complainant, or that an exception was preserved. Therefore the question raised upon this account is not properly before this court. The rule is that in order to question the correctness of the Master's finding, an objection must be made to such finding before the Master, and if overruled, then an exception must be taken before the court. The complainant having failed to comply with this rule, the question is not properly before this court.

We also find from an examination of the record that there

The complaint contends that the amount of the order was to be the basis upon which the commission was to be computed, and that the amount found to be due is erroneous. The master found that under the terms of the contract the commission was to be computed upon goods purchased and received by the defendant. This is a reasonable construction of the contract, and such construction is supported by the use of such words as "purchased" and "received" which are used in the contract. "I have been told that the commission would be entitled to commission only on sales made to purchasers of 'our making machinery,' a product of the defendant. The first contention urged by the complainant is that under the terms of the contract he is entitled to an additional 10% commission on this account, it being a new one. The complainant deposes the 10% commission, which, from the evidence, seems to have been received by him without complaint until a short time before the filing of his bill. The master's finding is supported by the evidence, and his finding was approved by the Justice of the Peace, and it does not appear from the facts as passed upon the question, and it does not appear from the facts that the finding was erroneous. In the evidence introduced by the defendant, it is shown that the master was assisted by the Chancellor, and, from the record, it does not appear that the commission was objected to by the complainant, or that an exception was preserved. Therefore the question arises upon this account is not properly before this court. The rule is that in order to question the correctness of the master's finding, an objection must be made to such finding before the master, and if overruled, then an exception must be taken before the court. The complainant failed to do so, and the finding is not properly before this court. It is also clear from an examination of the record that there

is no dispute as to the Mitsui & Company account. It is admitted by the defendant that through an oversight the complainant was not credited with certain commissions on this account, and that the same are due. That the amount so ^{is} ~~due~~/included in the decree. This also applies to the China Canning Co.

The only other item complained of is that of the Tupman-Thurlow Co., and the complainant contends that he is entitled to a 10% commission on the total amount of the goods sold to this concern by the defendant, for the reason that the goods in question were shipped into the territory of China, which territory is covered by complainant's contract. The question then is: Did the defendant have knowledge when it sold these goods to the Tupman-Thurlow Co. that the goods were to be shipped into the territory covered by the contract between the parties? If so, the complainant is entitled to his commission. Upon the question of knowledge, the evidence is to the effect that the purchaser of these goods was never a customer of the defendant; that the purchase was made by Tupman-Thurlow Co.; that the sale originated with Tupman-Thurlow Co. in Chicago, and that the goods were shipped by the defendant to this concern in Chicago; that Tupman-Thurlow Co. gave the International Forwarding Company shipping instructions and the goods were shipped by this Forwarding Co. to the Shanghai Ice and Cold Storage Company, Nanking via Shanghai; that the defendant in the instant case did not ship these goods, and the court found, in approving the Master's finding, that these goods were shipped, without its knowledge, into the territory covered by the contract between the parties.

The evidence does not indicate that this was a sale made to a customer in the territory covered by the contract, nor that the shipping of these goods was handled by the defendant in a way that would tend to show an effort on the part of the defendant to

is an invoice as to the Mutual A Company account. It is admitted by the defendant that through an oversight the complainant was not notified with certain commissions on this account, and that the same are due. That the amount of goods included in the invoice, this also applies to the Mutual A Company account.

The only other item contained of is that of the Turner-Thurston Co., and the complainant contends that he is entitled to a 10% commission on the total amount of the goods sold to this concern by the defendant, for the reason that the goods in question were shipped into the territory of China, which territory is covered by the complainant's contract. The question then is: Did the defendant have knowledge when it sold these goods to the Turner-Thurston Co. that the goods were to be shipped into the territory covered by the contract between the parties? If so, the complainant is entitled to his commission. Upon the question of knowledge, the evidence is to the effect that the purchase of these goods was never a customer of the defendant; that the purchase was made by Turner-Thurston Co.; that the sale originated with Turner-Thurston Co. in Chicago, and that the goods were shipped by the defendant to this concern in Chicago; that Turner-Thurston Co. gave the International Forwarding Company shipping instructions and the goods were shipped by this forwarding Co. to the defendant via the Great Eastern Steamship Co.; that the defendant in the instant case did not ship these goods, and the court found, in approving the Master's finding, that these goods were shipped, without its knowledge, into the territory covered by the contract between the parties.

The evidence does not indicate that this was a sale made to a concern in the territory covered by the contract, nor that the shipping of these goods was handled by the defendant in a way that would tend to show an effort on the part of the defendant to

avoid payment of a commission. Therefore, the court was clearly justified in finding that the sale was made to the Tupman-Thurlow Co. in good faith. The test is not necessarily where the defendant entered into the contract with Tupman-Thurlow Co., or where the goods were delivered, or even the intention of not violating the terms of the contract with the complainant. The controlling fact is that the defendant had knowledge that the destination of the product sold to the Tupman-Thurlow Co. was to be, and in fact was, shipped by the defendant to points within the exclusive territory covered by the contract between the parties. Marshall v. Canadian Cordage and Mfg. Co. 160 Ill. App. 114.

The Chancellor was justified in approving the Master's report when he found that it does not appear from the evidence that the defendant had knowledge that the destination of the goods sold to Tupman-Thurlow Co. was within the exclusive territory covered by the contract between the complainant and the defendant.

We are of the opinion that the decree ordered by the court is supported by the evidence and that there is no such error as would justify a reversal. The decree is therefore affirmed.

DECREE AFFIRMED.

WILSON, P.J. AND HALL, J. CONCUR.

avoid payment of a commission. Therefore, the court was clearly justified in finding that the sale was made by the Thomas-Thomson Co. in good faith. The fact is not necessarily where the defendant entered into the contract with Thomas-Thomson Co., or where the goods were delivered, or even the intention of not violating the terms of the contract with the complainant. The controlling fact is that the defendant had knowledge that the destination of the product sold to the Thomas-Thomson Co. was to be, and in fact was, shipped by the defendant to points within the exclusive territory covered by the contract between the parties. Smith v. Smith, 100 Ill. App. 114.

The Chancellor was justified in approving the Master's report when he found that it does not appear from the evidence that the defendant had knowledge that the destination of the goods sold to Thomas-Thomson Co. was within the exclusive territory covered by the contract between the complainant and the defendant. He was of the opinion that the decree ordered by the court is supported by the evidence and that there is no such error as would justify a reversal. The decree is therefore affirmed.

NOTICE

WILLIAM L. L. AND WILLIAM L. GORDON

35909

HAHNEMANN INSTITUTIONS OF CHICAGO, INC.,
a Corporation, for use of First National
Bank of Palatine, a corporation,

Appellee,

v.

CENTRAL REPUBLIC BANK AND TRUST COMPANY,
a corporation, successor by consolidation
to Central Trust Company of Illinois,
a corporation,

Appellant.

APPEAL FROM

MUNICIPAL COURT

OF CHICAGO.

270 I.A. 615¹

Opinion filed March 29, 1933

MR. JUSTICE KESSEL DELIVERED THE OPINION OF THE COURT.

The Central Republic Bank and Trust Company, a corporation, successor by consolidation to the Central Trust Company of Illinois, a corporation, appeals from an order against it as garnishee in the case of Hahnemann Institutions of Chicago, Inc., for use of First National Bank of Palatine, a corporation, against said garnishee, which judgment was entered in the Municipal Court of Chicago.

From the material facts in the record it appears that a judgment by confession was entered in the Municipal Court on August 11, 1930, in favor of the plaintiff and against the Hahnemann Institutions of Chicago, Inc. for the sum of \$2,391.08. An execution was issued on this judgment on August 15, 1930, which was returned, on November 14, 1930, by the bailiff of the Municipal Court of Chicago, "No property found and no part satisfied." On August 25, 1930, upon motion of the defendant, leave was granted by the defendant to appear and make defense, and that the judgment was to stand as security, and that execution be stayed. On November 21, 1930, the trial court found that there was due to the plaintiff from the defendant as of the date of the confession, the sum of \$2,391.08, and entered judgment confirming the judgment of August 11, 1930.

On December 8, 1930, an affidavit for garnishee summons

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1. The first of these is the fact that the
2. Government of the United States has
3. been unable to secure the cooperation of
4. the various nations of the Western Hemisphere
5. in the enforcement of the Monroe Doctrine.
6. This is due to the fact that the
7. United States has been unable to secure
8. the cooperation of the various nations of
9. the Western Hemisphere in the enforcement
10. of the Monroe Doctrine.

510 A.I. 073

Opinion filed March 29, 1933

On November 8, 1930, an affidavit was furnished to the
August 11, 1930.
sum of \$2,301.00, and entered judgment confirming the judgment of
plaintiff from the defendant as of the date of the confession, the
November 21, 1930, the trial court found that there was due to the
was its stand as security, and that execution be stayed. On
by the defendant to spend and make defense, and that the judgment
August 28, 1930, upon motion of the defendant, leave was granted
Court of Chicago, "to satisfy loan and all past indebtedness."
was returned, on November 16, 1930, by the writ of the Municipal
execution was issued on this judgment on August 15, 1930, which
Municipality of Chicago, Inc., for the sum of \$2,301.00. An
11, 1930, in favor of the plaintiff and against the defendant
judgment of execution was entered in the Municipal Court on August

from the material facts in the record it appears that a
which judgment was entered in the Municipal Court at Chicago,
National Bank of Chicago, a corporation, against said garnishee,
case of National Institution of Chicago, Inc., for use of first
a corporation, against them an order against it as garnishee in the
procured by consolidation to the Central Trust Company of Illinois,
and further herein will find the origin of the debt.

was filed by the plaintiff, setting up the judgment, and praying that a garnishee summons be issued, which summons was duly issued and served upon the garnishee defendant in the instant case. The garnishee defendant filed its answer stating that it had sufficient funds in its hands to pay the plaintiff's claim in the sum of \$2,443.75. Thereafter, the judgment of November 21, 1930, was vacated, the cause reinstated, and, on January 13, 1931, the trial court upon a trial, found the issues for the defendant. Upon entry of the judgment, the plaintiff appealed to the Appellate Court. This court on December 2, 1931, entered an order to the effect that the judgment of the Municipal Court of Chicago be reversed or set aside and entered judgment for the plaintiff, the First National Bank of Palestine, and against the defendant, the Mahnemann Institutions of Chicago, Inc., in the sum of \$2,550.39.

Prior to the entry of the judgment by this court, the Central Trust Company of Illinois, as garnishee, moved to be discharged, and on February 3, 1931, this motion was overruled, and thereafter, upon entry of the order and judgment of the Appellate Court, upon motion of the plaintiff, a judgment was entered in the Municipal Court of Chicago against the defendant garnishee on its answer, which had been filed on December 16, 1930, for the sum of \$2,443.75.

The order of the Appellate Court entered on December 5, 1932, in the case of the First National Bank of Palestine v. Mahnemann Institutions of Chicago, Inc. in case No. 35070, is to the effect that the judgment of the Municipal Court of Chicago against the plaintiff was reversed, annulled and set aside, and as a result, the judgment so entered in the Municipal Court of Chicago was vacated by this order. The original judgment by confession was then in full force and effect as confirmed by the trial court on November 11, 1930, and

was filed by the plaintiff, setting up the judgment, and paying
that a purchase money mortgage was issued, which mortgage was duly issued
and served upon the defendant in the instant case. The
defendant then filed its answer stating that it had no liability

therein in the hands to pay the plaintiff's claim in the sum of
\$1,425.75. Thereafter, the judgment of November 21, 1930, was
reversed, the same reinstated, and, on January 13, 1931, the trial
court upon a trial found the issues for the defendant. Upon entry
of the judgment, the plaintiff appealed to the Appellate Court.

This court on December 3, 1931, entered an order to the effect that
the judgment of the Municipal Court of Chicago be reversed or set
aside and entered judgment for the plaintiff, the First National
Bank of Chicago, and against the defendant, the Home Loan Invest-
ments of Chicago, Inc., in the sum of \$1,425.75.

There is no entry of the judgment of this court, the
Central Trust Company of Chicago, as guardian, moved to be dis-
charged, and on February 9, 1932, this motion was overruled, and
thereafter, upon entry of the order and judgment of the Appellate
Court, upon motion of the plaintiff, a judgment was entered in the
Municipal Court of Chicago against the defendant defendant in the
sum of \$1,425.75, which had been filed on December 10, 1930, for the sum of
\$1,425.75.

The order of the Appellate Court entered on December 3,
1931, in the case of the First National Bank of Chicago v. Home Loan
Investments of Chicago, Inc., in case No. 28070, is to the effect
that the judgment of the Municipal Court of Chicago against the plain-
tiff was reversed, annulled and set aside, and as a result, the judg-
ment so entered in the Municipal Court of Chicago was vacated by this
court. The original judgment by confession was then in full force and
effect as confirmed by the trial court on November 11, 1930, and

~~inxx~~ the judgment entered by the Appellate Court for the sum of \$2,580.39, in effect, affirmed the judgment by confession. This judgment may be irregular in form, but it is final and res adjudicata as between the parties as to the original judgment.

The appeal by the plaintiff in that case stayed the execution of the judgment entered in the Municipal Court, and when the order was entered by this court its validity was at an end, and from the facts found in the order of the Appellate Court, the judgment in question was restored upon the entry of the order. The same result would have followed if the order had been the same and the cause remanded to the trial court to enter a proper order. The Appellate Court had jurisdiction both of the parties and the subject matter, and is authorized by law under circumstances such as appear in this record, to render judgment, and the order, upon the Court's finding of fact, was justified. Manistee Lumber Co. v. Union Nat. Bank, 143 Ill. 490.

Garnishment proceedings under the statute of this state covering such actions, are supplementary to the judgment against the judgment debtor, and there can be no recovery in a proceedings against the garnishee unless the judgment debtor might maintain an action at law against the garnishee for whatever it is that the judgment creditor seeks to recover against the garnishee. Bank of Commerce v. Franklin, 88 Ill. App. 198.

There is no question that the judgment against the defendant was a part of the record in the original case. This proceeding depends upon the finality of the judgment against the defendant, Rahnmann Institutions of Chicago, Inc., and it would seem from this record that the sum due from the garnishee to the defendant should be applied to the payment of the plaintiff's judgment,

think the judgment entered by the Appellate Court for the sum of \$2,500.00, is correct, affirmed the judgment by confession. This judgment may be irregular in form, but it is final and the affidavit as between the parties as to the original judgment.

The appeal by the plaintiff in that case stayed the execution of the judgment entered in the Municipal Court, and when the order was entered by this court the validity was at an end, and from the time that the order of the Appellate Court, the judgment in question was restored upon the entry of the order. The same result would have followed if the order had been the same and the same remained to the trial court to enter a proper order. The Appellate Court had jurisdiction both of the parties and the subject matter, and is authorized by law under circumstances such as appear in this record, to reverse judgment, and the order, and the Appellate Court of law, was justified, affirmed judgment of the Municipal Court, for \$2,500.00.

There is no question that the judgment against the defendant covering such action, was supplementary to the judgment against the judgment debtor, and there can be no recovery as a preference against the garnishee unless the judgment debtor might maintain an action at law against the garnishee for whatever it is that the judgment debtor owes to the garnishee. and it

Lawrence v. Trumbull, 82 Ill. App. 198.

There is no question that the judgment against the defendant was a part of the record in the original case. This proceeding began upon the finality of the judgment against the defendant, Lawrence Institution of Chicago, Inc., and it would seem from this record that the sum due from the garnishee to the defendant should be applied to the payment of the plaintiff's judgment.

The garnishee defendant, however, submits the question as to the status where a judgment upon which the garnishment is based, is superseded by a judgment in a court of appellate jurisdiction. The vacation of the judgment of dismissal upon appeal restores the judgment entered by confession. While it is true that as the record now stands there appear to be two judgments in one action - which is irregular - the difference between the two judgments is that in one of them leave was granted the defendant by the trial court to defend and the judgment was afterwards confirmed and is still in full force and effect; and in the other, a judgment was entered in the Appellate Court and is binding upon the plaintiff and the defendant. It is not void in the sense that the court was without jurisdiction of the persons and the subject matter. But however irregular, the garnishee has no right to complain of such matters as do not go to the jurisdiction of the court. Bennison, et al. v. Taylor, et al., 142 Ill. 45. In that case the Supreme Court announced the established rule covering actions of this kind, which rule is applicable to the issues involved in this case. The court makes this statement of the rule:

"In respect to irregularities that amount to error, merely, in the proceedings of the court disposing of the main controversy, - i. e., the controversy between the plaintiff in attachment and the defendant in attachment - the garnishee has no right to complain, for such matters do not concern him; but when the defect goes to the jurisdiction of the court to act in the premises, and the question is whether or not the tribunal assuming to act has jurisdiction of the subject matter or of the person of the defendant in attachment, the rule is otherwise. The plainest dictates of justice require that this should be so, for if it was not, the garnishee might be compelled to pay the same debt twice."

In this opinion, the court quoted with approval from Pierce v. Carleton, 12 Ill. 358, as follows:

The garnishee defendant, however, admits the question as to the status of a judgment upon which the garnishment is based, is superseded by a judgment in a court of appellate jurisdiction. The vacation of the judgment of dismissal upon appeal restores the judgment entered by confession. While it is true that as the record now stands there appear to be two judgments in one action - which is improper - the difference between the two judgments is that in one of them leave was granted the defendant of the trial court to defend and the judgment was afterwards confirmed and is still in full force and effect; and in the other judgment was entered in the appellate court and is binding upon the plaintiff and the defendant. It is not true in the sense that the court was without jurisdiction of the persons and the subject matter. But however improper, the garnishment has no right to require it and matters as do not go to the jurisdiction of the court. Johnson, et al. v. Taylor, et al., 128 Ill. 45. In this case the court expressly so held. This covering motions at this time, which will be applicable to the issues involved in this case. The court makes this statement of the rule:

"It is not to be overlooked that leaving in error, in the proceedings of the court disposing of the main controversy, - i. e., the controversy between the plaintiff in attachment and the defendant in attachment - the garnishee has no right to complain, but such matters as not concern him; but when the defect goes to the jurisdiction of the court to act in the premises, and the question is whether or not the judgment remaining to set has jurisdiction of the subject matter or of the person of the defendant in attachment, the rule is otherwise. The plaintiff desires of justice results that this should be so, for if it were not, the garnishee might be compelled to pay the same over twice."

In this opinion, the court quoted with approval from

Pierce v. Carter, 12 Ill. 358, as follows:

"It is clear, therefore, that a garnishee should be permitted to inquire into the validity of the previous proceedings in the case. If such proceedings are void, the judgment against the garnishee may for that cause be reversed on error. But if the court had jurisdiction, its errors and irregularities can only be called in question by the defendant, and that, too, in a direct proceeding for the purpose. They affect him only, and he may waive or insist on them. The garnishee has no cause to complain, for he will be protected in the payment of the judgment."

As an indication that the judgment order of the Appellate Court is an irregularity that does not affect the merits, but rather goes to its form, this court in the case of Cervenka v. Hunter, et al., 185 Ill. App. 547, in a somewhat similar situation where two judgments were entered in one action, said:

"This was undoubtedly irregular, because the judgment which was entered August 3, 1911, still stood on the record according to the order of August 8, 1911.

The judgment should have been in the form set forth in Lyman et al v. Kline, 128 Ill. App. 497, and Northeastern Coal Company v. Tyrrell, 133 Ill. App. 472.

But as we said in Lyman et al v. Kline, supra, 'such error can be corrected without affecting the merits of the cause or the rights of appellants.'

From the judgment of February 24, 1912, the defendants appealed to this Court, and as among the errors assigned is one that the Court erred in entering two judgments in the cause, we must, for this error, which is well assigned, remand the cause for a correction of the judgment. But we find no reason to do so for a new trial. There is no error affecting the merits of the cause."

The judgment order entered in the Appellate Court in the instant case is an irregularity that goes to the form only. The judgment by confession confirmed by the trial court on November 11, 1930, is the judgment upon which this garnishment proceeding is founded, and the garnishee-defendant is amply protected in complying with the judgment of the Municipal Court of Chicago by paying the amount admitted due in its answer. The irregularity does not affect the validity of the previous proceeding and it can be questioned if at all by the defendant in the original suit.

The judgment is accordingly affirmed.

JUDGMENT AFFIRMED.

It is clear, therefore, that a question should be raised as to whether the validity of the original findings in the case. It must be noted that the original findings of the Commission are not binding on the Commission. The Commission has jurisdiction to review the findings of the Commission and to set them aside if it is satisfied that they are not in accordance with the facts and the law. The Commission has no power to set aside the findings of the Commission if it is satisfied that they are in accordance with the facts and the law. The Commission has no power to set aside the findings of the Commission if it is satisfied that they are in accordance with the facts and the law.

As indicated in the introduction the judgment order of the court is as follows:

There are no indications that anyone was involved in the attack.

[illegible]

est et fides etiam est in bonis rebus etiam est

by the defendant in the criminal suit.
activity of the business proceeding and it will be mentioned by all
attest me in the present. The investigation does not affect the
judgment of the criminal court in Chicago by which the verdict was
and the defendant-defendant is being prosecuted in compliance with the
1935, is the judgment upon which this business proceeding is founded
judgment by defendant as contained by the trial court on November 14,
least case is an irregularity that goes to the heart only. The

The document is accordingly entitled:

RECEIVED BY THE U.S. DEPT. OF AGRICULTURE

35919

EDWARD E. NOVAK,

Appellant,

v.

PETER W. HANSEN,

Appellee.

APPEAL FROM

MUNICIPAL COURT

OF CHICAGO.

270 I.A. 615²

Opinion filed March 29, 1933

MR. JUSTICE HERBEL DELIVERED THE OPINION OF THE COURT.

This is an action in replevin brought by the plaintiff against the defendant for the recovery of certain goods and chattels. The property was not recovered by the plaintiff upon the service of the replevin writ, and therefore he filed by leave of court a count in trover to recover the value of the chattels. Trial was had before the court without a jury, and at the conclusion of the hearing the court found for the defendant, and entered judgment on the finding, from which judgment the plaintiff appeals. The defendant did not follow this appeal, and therefore we are without the benefit of his brief.

The evidence is substantially that the plaintiff and Catherine G. Symczyk entered into a contract by which the plaintiff agreed to sell and Catherine G. Symczyk agreed to purchase the property known as 519 West 118th Street, Chicago; that by the terms of this agreement Catherine G. Symczyk agreed to pay \$8,460 in monthly installments of \$225, and, upon payment of the sum provided for, the plaintiff agreed to convey title to the property in question to the purchaser, subject to a first mortgage of \$15,000, and also a second mortgage of \$11,980; that when Catherine G. Symczyk took possession of the premises there was attached to the building, as a part of the realty, one bath tub and connections, a water heater, and water tank and stand, the chattels involved in this proceeding; that default was made in the payment of the monthly installments provided for by

STATE OF TEXAS,
COUNTY OF DALLAS,
vs.
JAMES E. HARRIS,
Defendant.

Opinion filed March 29, 1935

THE STATE OF TEXAS, by and through the Attorney General, complains against the defendant for the recovery of certain goods and chattels. The property was not recovered by the plaintiff until the service of the writ of replevin was filed by leave of court a return in proper form was made the value of the chattels. The writ was not returnable until the 1st day of July, and at the conclusion of the return the goods were taken into the possession of the plaintiff and retained by him until the 1st day of August, 1934, when the goods were returned to the defendant. The plaintiff claims that the goods were taken into the possession of the plaintiff and retained by him until the 1st day of August, 1934, when the goods were returned to the defendant. The plaintiff claims that the goods were taken into the possession of the plaintiff and retained by him until the 1st day of August, 1934, when the goods were returned to the defendant.

The evidence is substantially that the plaintiff and defendant entered into a contract by which the plaintiff agreed to sell and deliver to the defendant a certain quantity of goods. The plaintiff claims that the goods were taken into the possession of the plaintiff and retained by him until the 1st day of August, 1934, when the goods were returned to the defendant. The plaintiff claims that the goods were taken into the possession of the plaintiff and retained by him until the 1st day of August, 1934, when the goods were returned to the defendant. The plaintiff claims that the goods were taken into the possession of the plaintiff and retained by him until the 1st day of August, 1934, when the goods were returned to the defendant.

the contract; that Catherine G. Symczyk made some of the monthly payments provided for by the contract, but failed to continue to make payments, as agreed upon, and being in default, abandoned the premises in question together with the defendant, who was a tenant of the purchaser; that while Catherine G. Symczyk was in possession of the premises, the chattels above mentioned were detached and removed, and from the evidence it appears that they were sold by Catherine G. Symczyk to the defendant, and that the defendant had knowledge that the bath tub and connections, together with the water heater and tank came from the building at 519 West 119th Street, Chicago, at the time he claims to have purchased the chattels from Catherine Symczyk; and that these chattels were subsequently installed in the defendant's building located at 725 119th Street, Chicago.

The chattels were attached to the building, and being so installed became a part of the realty, and they were so attached at the time the purchaser, Catherine G. Symczyk took possession. She was without title to the premises and therefore could not dispose of the chattels by sale after tortious removal, and convey title to the defendant. The defendant took the chattels with the knowledge that they were formerly installed as a part of the realty at 519 West 119th Street, and by his alleged purchase of these chattels from Catherine G. Symczyk obtained no title.

From the facts, the court erred in entering judgment for the defendant, and for the reasons stated the judgment is reversed and the cause remanded.

REVERSED AND CAUSE REMANDED.

WILSON, P.J. AND HALL, J. CONCUR.

the contract; that Catherine E. Symczyk made some of the monthly payments provided for by the contract, but failed to continue to make payments, as agreed upon, and being in default, abandoned the premises in question together with the defendant, who was a tenant of the premises; that while Catherine E. Symczyk was in possession of the premises, the chattels above mentioned were detached and removed, and from the evidence it appears that they were sold by defendant E. Symczyk to the defendant, and that the defendant had knowledge that the said sub and connections, together with the water heater and tank were from the building at 215 West Fifth Street, Chicago, at the time he claims to have purchased the chattels from Catherine Symczyk; and that these chattels were subsequently installed in the defendant's building located at 732 West Fifth Street, Chicago. The chattels were attached to the building, and being so installed became a part of the realty, and they were so attached at the time the defendant, Catherine E. Symczyk took possession. The defendant claims to the plaintiff and defendant could not attach to the chattels by sale after tortious removal, and convey title to the defendant. The defendant took the chattels with the knowledge that they were formerly installed as a part of the realty at 215 West Fifth Street, and by his alleged purchase of these chattels from Catherine E. Symczyk obtained no title. From the facts, the court was in reaching judgment for the defendant, and for the reasons stated the judgment is reversed, and the cause remanded.

REVEREND AND HONORABLE

35937

DAVID B. FRANZ,

Appellee,

v.

CANTON ROLLING MILL CORPORATION,
a corporation, et al.,

Defendants,

On Appeal of GODFREY COHN, et al.,

Appellant.

APPEAL FROM

SUPERIOR COURT

OF COOK COUNTY.

270 I.A. 615³

Opinion filed March 29, 1933

MR. JUSTICE RESEL DELIVERED THE OPINION OF THE COURT.

This is a suit by the plaintiff against the defendants Godfrey Cohn, Charles M. Easterly and Canton Rolling Mill Corporation. The plaintiff by his declaration alleged that the defendants sold to him shares of the capital stock of the Canton Rolling Mill Corporation for \$1,000, and that this sale was in violation of the Illinois Securities Act. The defendant Godfrey Cohn was the only one served with summons. He entered his appearance and filed a plea and affidavit of defense. The other defendants, Canton Rolling Mill Corporation and Charles M. Easterly were not served with summons and did not file an appearance. These defendants were not represented, and it appears that they were not present at the trial of the cause. The case was tried before the court, and judgment entered for the plaintiff and against the three defendants, Godfrey Cohn, Charles M. Easterly and Canton Rolling Mill Corporation, in the sum of \$1,350, which sum represents \$1,000 paid by the plaintiff for the stock, and \$350 for attorney's fees allowed in this case. From this judgment the defendant Godfrey Cohn appealed to this court by filing an appeal bond, which was approved by the trial court on February 23, 1932. The record was filed on March 15, 1932. On the same date the defendant Godfrey Cohn filed an abstract of the record, followed by a brief, which was filed on April 20, 1932.

270 I.A. 615

Opinion filed March 29, 1933

MR. JUSTICE BRIDGES delivered the opinion of the court.
This is a writ of the plaintiff against the defendant.
Gentry John, Charles A. Jackson and Gordon William Hill Corporation.
The plaintiff by his declaration alleged that the defendant sold
to him shares of the capital stock of the Gordon William Hill
Corporation for \$1,000, and that this sale was in violation of the
Illinois Securities Act. The defendant Gentry John and the only
one named with someone. He entered his appearance and filed a plea
and affidavit of defense. The other defendants, Gordon William Hill
Corporation and Charles A. Jackson were not served with summons and
did not file an appearance. These defendants were not represented,
and it appears that they were not present at the trial of the cause.
The case was tried before the court, and judgment entered for the
plaintiff and against the three defendants, Gentry John, Charles A.
Jackson and Gordon William Hill Corporation, in the sum of \$1,000,
which sum represents \$1,000 paid by the plaintiff for the stock,
and also for attorney's fees allowed in this case. Two days later
went the defendant Gentry John appeared to this court by filing
an appeal bond, which was approved by the trial court on February
21, 1933. The record was filed on March 15, 1933. On the same date
the defendant Gentry John filed an abstract of the record, followed
by a brief, which was filed on April 20, 1933.

The defendant's contention, as appears from his brief, is that the court entered an erroneous joint judgment against the defendants Godfrey Cohn, Charles M. Easterly and the Canton Rolling Mill Corporation; that Godfrey Cohn was the only defendant served with summons and he, filed his appearance and was present in court at the trial. Upon this state of the record this court would have to reverse the judgment and remand the cause for a further trial. However, after appeal to the Appellate Court had been perfected, the trial court on motion of the plaintiff and after notice to the defendant Godfrey Cohn, entered an order on June 7, 1932, amending the judgment order by striking out the names of the defendant, Canton Rolling Mill Corporation and Charles M. Easterly, for want of services of summons and these defendants not being in court.

Upon the plaintiff suggesting a diminution of the record, a supplemental record was filed showing an amended judgment entered by the trial court.

The defendant before this court insists that the trial court erred in entering the judgment and has called to our attention the case of the Illinois Land & Loan Co. v. McCormick, et al. 51 Ill. 322. In that case after the record was filed in the Supreme Court and errors assigned, the decree was amended in the court below at a subsequent term to the one at which the decree was entered. The Supreme Court held that such practice was irregular and that the Supreme Court must and did decide the case upon the record originally filed. The instant case is properly in the Appellate Court, and this court has jurisdiction. This jurisdiction cannot be ousted by the subsequent order amending the judgment entered by the trial court. Barnard v. Bettensmier, 89 Ill. App. 241.

The amended judgment before this court was not entered

The defendant's contention, as appears from his brief, is that the court entered an erroneous judgment against the defendant, William John, Charles E. Sawyer and the Boston Building. It is contended that William John was the only defendant named with summons and he, filed his appearance and was present in court at the trial. Upon this state of the record this court would have to reverse the judgment and remand the cause for a further trial. However, after appeal to the Appellate Court had been perfected, the trial court on motion of the defendant, Charles E. Sawyer, entered an order on June 7, 1933, annulling the judgment entered by striking out the names of the defendant, William John Sawyer and Charles E. Sawyer, the cost of services of attorneys and these defendants not being in court. Upon the plaintiff suggesting a dissolution of the record, a judgment entered was filed annulling the judgment entered by the trial court.

The defendant before this court insists that the trial court acted in violation of the judgment and has failed to pay attention to the case of the Illinois Land & Iron Co. v. Commonwealth, 21 Ill. 2d 111. In that case the record was filed in the Appellate Court and errors assigned, the errors were amended in the court below as a subsequent term to the one at which the errors were entered. The Supreme Court held that such practice was irregular and that the Appellate Court was not to decide the case upon the errors originally filed. The instant case is properly in the Appellate Court, and this court has jurisdiction. This jurisdiction cannot be ousted by the subsequent order annulling the judgment entered by the trial court.

People v. Commonwealth, 21 Ill. 2d 111.

The amended judgment before this court was not entered.

upon the hearing of further evidence by the court. That is evident from the bill of exceptions in such proceeding. Whether the amended order was entered upon a memorandum or other record does not appear from the order itself. As a matter of fact, there was no evidence heard by the trial court upon the plaintiff's motion to amend the judgment order after term time, and there does not appear to be any evidence which would justify the court in finding that the court clerk, contrary to the order of the court, entered the judgment in question. C. B. & Q. M. H. Co. v. Wiegler, 165 Ill. 634.

In the disposition of this matter, this court will consider the original record filed, and from this record it appears that the judgment was entered jointly as to the defendants, Canton Rolling Mill Corporation, Godfrey Cohn, and Charles E. Masterly; that Godfrey Cohn was the only defendant served with summons and who filed his appearance in the cause below, and that the defendants Canton Rolling Mill Corporation and Charles E. Masterly, not being properly in court, the judgment was erroneously entered, and being so entered as to the defendants, the judgment is reversed and the cause remanded.

REVERSED AND REMANDED.

WILSON, P.J. AND HALL, J. CONCUR.

36001

WILLIAM FETZER,

Defendant in Error,

v.

SOUTH SANTA FE LAND & DEVELOPMENT
COMPANY,

Plaintiff in Error.

ERROR TO

CIRCUIT COURT,

COOK COUNTY.

270 I.A. 615⁴

Opinion filed March 29, 1933

MR. JUSTICE NEBEL DELIVERED THE OPINION OF THE COURT.

This is a writ of error prosecuted by the defendant from an order entered on June 13, 1931, by the trial court vacating an order entered on April 4, 1931, granting the defendant leave to plead to a judgment by confession upon a promissory note payable to the plaintiff in the sum of \$32,833.90.

The defendant presented a motion, supported by an affidavit, to the trial court, asking for leave to plead and that the judgment by confession entered on January 6, 1927, stand as security wherein William Fetzer is the plaintiff and the South Santa Fe Land & Development Company, a corporation, is the defendant. The affidavit in support of the motion was made by one George E. Fosberg, dated January 5, 1931, in which affidavit it is stated, in part, that affiant recently discovered that on January 6, 1927, without notice, the plaintiff caused a judgment by confession to be entered against the defendant in the Circuit Court of Cook County upon an alleged promissory note executed by the said defendant, by the affiant as president, and one J. E. Wichey, as secretary of this corporation, payable to the order of the plaintiff; that fraud was practiced upon the court in the procurement of the judgment by confession; that the said promissory note is not the genuine note of the defendant corporation; that the signature of affiant is not the genuine signature of affiant as president of the defendant company, and that the J. E. Wichey,

1000

WILLIAM BAKER

Residence in New York

WILLIAM BAKER

COOK COUNTY

COOK COUNTY IS A CORPORATION

Residence in New York

Opinion filed March 29, 1933

COOK COUNTY IS A CORPORATION

This is a writ of error prosecuted by the defendant

an order entered on June 10, 1931, by the trial court vacating an

order entered on April 4, 1931, granting the defendant leave to plead

to a judgment of \$22,000.00.

plaintiff in the sum of \$22,000.00.

The defendant presented a motion, supported by an affidavit,

to the trial court, asking for leave to plead and that the judgment

by confession entered on January 6, 1931, stand as finally entered.

William Baker in the plaintiff and the defendant. The affidavit

Navigation Company, a corporation, is the defendant. The affidavit

in support of the motion was made by one George E. Leach, dated

January 6, 1931, in which affidavit it is stated, in part, that

plaintiff presented a motion, supported by an affidavit, dated

the plaintiff caused a judgment by confession to be entered against the

defendant in the Circuit Court of Cook County upon an alleged prom-

issory note executed by the said defendant, by the plaintiff as presi-

dent, and one J. E. Bishop, an secretary of said corporation, payable

to the order of the plaintiff; that leave was granted upon the court

in the procurement of the judgment by confession; that the said

promissory note is not the genuine note of the defendant corporation;

that the signature of plaintiff is not the genuine signature of plaintiff

as president of the defendant company, and that the J. E. Bishop,

alleged to have signed said note as secretary of said company, was not elected or appointed secretary of said defendant corporation; that the defendant was never indebted to the plaintiff, and that the corporation was never authorized by its Board of Directors to execute said judgment note, and that no execution was ever issued after said judgment was entered; that affiant from an independent source obtained knowledge of the entry of the judgment, and that on April 4, 1931, the motion for leave to plead was allowed; that thereafter the defendant filed its several pleas, and that each of said pleas was properly verified by an officer of the defendant corporation.

On May 23, 1931, a motion was filed by the plaintiff to vacate and set aside the order of April 4, 1931, granting leave to the defendant to plead and defend, and the plaintiff in support of said motion filed his verified petition, which states in part that prior to the entry of the judgment in the instant case he called upon George E. Fosberg, president of the defendant company and demanded payment, and that Fosberg asked for a delay; that J. E. Wichey, secretary of the company, also requested that action be delayed, and that from the maturity of the note in 1922, until 1936, the plaintiff made frequent demands on Fosberg and Wichey for payment, and finally caused the entry of the judgment.

It further appears from this affidavit that the plaintiff preceeded in the early part of 1927, by an action in the Circuit Court of Santa Fe County, New Mexico, based upon the judgment by confession. An order was entered in that proceeding to sell certain lands of the defendant in Santa Fe County, New Mexico, and said lands were sold at a public sale to the plaintiff and a deed was issued to the plaintiff therefor.

The defendant filed an answer to the plaintiff's petition, supported by an affidavit of one George E. Fosberg, in which he states that he is now and for one year last past has been confined in the

alleged to have signed said note as secretary of said company, was
not elected an appointed secretary of said defendant corporation;
that the defendant was never indebted to the plaintiff, and that the
corporation was never authorized by its Board of Directors to execute
said judgment note, and that no execution was ever issued after said
judgment was entered; that affidavits from an independent source obtained
knowledge of the entry of the judgment, and that on April 4, 1901,
the action was leave to plead was allowed; that thereafter the
defendant filed its answer to said complaint, and that each of said cases was
properly verified by an affidavit of the defendant corporation.
On May 27, 1901, a motion was filed by the plaintiff to
dismiss the action with costs at \$100.00, claiming that on the
defendant's plead and docket, and the plaintiff in support of said
motion filed his verified petition, which stated in part that while
at the entry of the judgment in the Federal Court he called upon
George E. Leberg, President of the defendant company and demanded
payment, and that Leberg asked for a delay; that J. E. Wihay,
secretary of the company, also requested that action be delayed, and
that from the minute of the case in 1901 until 1905, the plaintiff
made frequent demands on Leberg and Wihay for payment, and finally
secured the entry of the judgment.
It further appears from this affidavit that the plaintiff
proceeded in the early part of 1907, by an action in the Circuit
Court of said county, New Mexico, based upon the judgment by
consent. In order was entered in that proceeding to sell certain
lands of the defendant in Santa Fe County, New Mexico, and said lands
were sold at a public sale to the plaintiff and a deed was issued
to the plaintiff thereon.
The defendant filed an answer to the plaintiff's petition,
supported by an affidavit of one George E. Leberg, in which he states
that he is now and has been for some time past been confined in the

state penitentiary at Joliet, Illinois. Upon an examination of the affidavit we find that the facts relate largely to the merits of the litigation between the parties.

The only question that this court will consider is, did the defendant exercise diligence in moving that the court grant leave to this defendant to plead. The judgment by confession was entered on January 6, 1927, and no steps were taken by the defendant until April 4, 1931, when the court entered the order granting defendant leave to plead. This order was entered more than four years after the judgment became a matter of record. The rule is well established that a motion for leave to plead should be made at the earliest moment. This is essential in order to evoke the jurisdiction of the court.

The defendant contends that in making application to the court for leave to plead to a judgment entered by confession, it is improper for the court to hear and consider counter-affidavits upon the merits of the controversy. That is the general rule. The application for leave to defend is addressed to the discretion of the court, and calls for the exercise of the equitable power of the court over its own judgment, and it should not be exercised for mere irregularities or defects, and it would be unjust unless a good defense is shown. While a counter-affidavit controverting the defendant's prima facie defense upon the merits is not proper, still counter-affidavits may be entertained upon a motion to vacate a judgment for leave to plead, where the question is principally for the court to determine whether it has jurisdiction to act after term time.

In the instant case the judgment by confession was entered several years before the order granting the defendant leave to plead was entered by the court. The important question therefore is one of diligence, and that question does not go to the merits of the

state constitutionality of article, Illinois. Upon an examination of the
statute we find that the facts herein largely to the merits of the
litigation between the parties.

The only question that this court will consider is, did
the defendant exercise diligence in moving that the court grant
leave to this defendant to plead. The judgment by confession was
entered on January 6, 1887, and no steps were taken by the defendant
until April 1, 1887, when the court entered the order granting
leave to plead. This order was entered more than four
years after the judgment became a matter of record. The rule is well
established that a motion for leave to plead should be made at
the earliest moment. This is essential in order to secure the dis-
cretion of the court.

The defendant contends that in making application to the
court for leave to plead he is a judgment entered by confession, it is
improper for the court to hear and consider counter-claims upon
the merits of the controversy. That is the general rule. The applica-
tion for leave to defend is addressed to the discretion of the court,
and while for the exercise of the equitable power of the court over
its own judgment, and it should not be exercised for more irregular
rules or delays, and it would be unjust unless a good defense is
shown. While a counter-claim is pending the defendant's
right to defend upon the merits is not proper, still counter-
claims may be introduced when a motion to vacate a judgment
for leave to plead, where the question is principally for the court
to determine whether it has jurisdiction to set aside the same.
In the instant case the judgment by confession was entered
several years before the order granting the defendant leave to plead
was entered by the court. The important question therefore is one
of diligence, and that question does not go to the merits of the

action between the parties, but rather to the exercise of jurisdiction by the court. If the court's jurisdiction is limited, as contended for by the defendant, then the only question to be considered is whether the defendant has a defense. We do not believe that the court is thus restricted in its consideration of the questions before the court, but that the court may in the instant case consider counter-affidavits to determine whether due diligence was exercised by the defendant. The rule is stated in the case of McCormick v. Loomis, 165 Ill. App. 214, in these words:

"On a motion to open a judgment the court may admit counter-affidavits or evidence in some instances where the question involved is a question for the court, purely; but it is improper to do so where the merits of the case only are involved, as the court cannot try the issues in that manner." Citing Dionne v. Matzenbaugh, 49 Ill. App. 527; The Gilchrist Trans. Co. v. The Northern Grain Co., 204 Ill. 510. See also Blake v. State Bank of Freeport, 178 Ill. 182."

The court properly exercised its jurisdiction when its attention was called to the fact that the defendant did not move for leave to plead for more than four years after the judgment by confession was entered. By reason of this delay in presenting its motion after judgment was entered and after it had knowledge, the defendant is properly chargeable with laches, and the court having jurisdiction of the parties and the subject matter, properly vacated the order entered on April 4, 1931, granting the defendant the right to defend.

The order is therefore affirmed.

ORDER AFFIRMED.

WILSON, P.J. AND HALL, J. CONCUR.

36038

SEYMOUR PRODUCTS COMPANY, a
Corporation,

Appellee,

v.

WILSON-WESTERN SPORTING GOODS CO.,
a Corporation,

Appellant.

23 A
APPEAL FROM

MUNICIPAL COURT

OF CHICAGO.

270 I.A. 616

Opinion filed March 29, 1933

MR. JUSTICE REBEL DELIVERED THE OPINION OF THE COURT.

This is an appeal by the defendant from a judgment entered in the sum of \$2,694.36 upon a directed verdict returned by a jury. The plaintiff's statement of claim alleges that on October 10, 1930, the plaintiff and the defendant entered into a contract whereby it was agreed that the plaintiff should manufacture for the defendant 25,000 special golf putters to be delivered within six months, for which the defendant agreed to pay 50¢ each, the putters to be delivered FOB Seymour, Connecticut.

The plaintiff in reliance on such contract, expended \$550. for special tools and dies necessary to manufacture such putters; that the manufactured parts which were to be used for the putters amounted to \$394.92, labor, \$500, and \$500 paid for commission in obtaining said contract, and \$750, being the profit on said contract; and alleges that it was ready, willing and able to perform, but that the defendant, on December 3, 1930 and December 9, 1930, refused to carry out its promise, to the damage of the plaintiff in the sum of \$2,694.92.

The defendant by its affidavit of merits denied that it at any time entered into a contract whereby the plaintiff should manufacture 25,000 special golf putters for the defendant at a price of 50¢ each, and denied that it was indebted to the plaintiff in any sum.

270 I.A. 616
 CHICAGO, ILL.
 RECEIVED
 APRIL 1933

1933
 STROUD PRODUCTS COMPANY, a
 Corporation,
 Plaintiff,
 v.
 STROUD-RENTON ROBERTS CO.,
 a Corporation,
 Defendant.

Opinion filed March 29, 1933

The plaintiff moved for summary judgment on the ground that this is an account by the defendant from a judgment entered in the sum of \$2,500.00 and a judgment rendered by a jury. The plaintiff's statement of claim alleges that on October 10, 1930, the plaintiff and the defendant entered into a contract whereby it was agreed that the plaintiff should manufacture for the defendant 25,000 special golf putters to be delivered within six months, for which the defendant agreed to pay \$25,000, the putters to be delivered for payment, respectively. The plaintiff in reliance on such contract, expended \$2500. The special team and class necessary to manufacture such putters; that the manufactured putters which were to be used for the putters amounted to \$2500.00, 12500, and \$2500 paid for commission in obtaining said contracts, and 7500, with the profit on said contracts; and alleges that it was ready, willing and able to perform, but that the defendant, on December 2, 1930 and December 2, 1930, refused to carry out its promise, to the damage of the plaintiff in the sum of \$2,500.00. The defendant by its affidavits of merits denied that it at any time entered into a contract whereby the plaintiff should manufacture 25,000 special golf putters for the defendant at a price of \$25 each, and denied that it was indebted to the plaintiff in any sum.

The evidence of the plaintiff is by deposition of witnesses and documentary evidence attached to the depositions.

The defendant offered no evidence other than an exemplified copy of the certificate of incorporation of the Wilson-Western Sporting Goods Company, dated December 30, 1930, and an exemplified copy of the amended articles of incorporation, changing the name from the Wilson-Western Sporting Goods Company, organized in 1925, to the Wilson Athletic Goods Company, dated March 12, 1931. The objection of the plaintiff to the admissibility of this evidence was sustained by the court. There was received in evidence a certified copy of the certificate of qualification of the Wilson-Western Sporting Goods Company, to do business in the State of Illinois.

At the close of the plaintiff's evidence and in order to conform to the proof offered by the defendant, the defendant asked leave to file an amended affidavit of merits, which leave was refused upon objections made by the plaintiff. The defendant contends that the trial court erred in excluding the defendant's offer of proof, and in refusing to permit the defendant to show that it did not enter into the contract with the plaintiff, in that it was not incorporated until December 30, 1930, which was after the alleged contract was made and breached.

It is evident that the corporation known as the Wilson-Western Sporting Goods Company was in existence and exercising its corporate powers when it entered into the contract with the plaintiff. No defense was offered that the contract was not entered into or a consequent loss sustained because of the breach by the defendant. The ground urged is that the court erred in refusing to admit in evidence the certificate of incorporation dated December 30, 1930. As a matter of fact, the corporation named as the defendant was incorporated in the year 1925, and in existence at the time the contract was entered into by the parties. It is contended, however,

The evidence of the plaintiff is by deposition of
alleged and defendant evidence obtained in the deposition.
The defendant offered no evidence other than an exemplified
copy of the certificate of incorporation of the Illinois-Wisconsin Sport-
ing Goods Company, dated December 30, 1930, and an exemplified copy
of the amended articles of incorporation, changing the name from
the Illinois-Wisconsin Sporting Goods Company, organized in 1927, to
the Illinois Athletic Goods Company, dated March 17, 1931. The objection
of the plaintiff to the admissibility of this evidence was sustained
by the court. There was received in evidence a certified copy of
the certificate of qualification of the Illinois-Wisconsin Sporting Goods
Company, to do business in the State of Illinois.

At the close of the plaintiff's evidence and in order to
conform to the proof offered by the defendant, the defendant asked
leave to file an amended affidavit of service, which leave was refused
upon objection made by the plaintiff. The defendant contends that
the trial court erred in sustaining the defendant's offer of proof,
and in refusing to permit the defendant to show that it did not
enter into the contract with the plaintiff, in that it was not
incorporated until December 30, 1930, which was after the alleged
contract was made and breached.

It is evident that the corporation known as the Illinois-
Wisconsin Sporting Goods Company was in existence and exercising its
corporate powers when it entered into the contract with the plaintiff.
The defense was offered that the contract was not entered into or a
consequent loss sustained because of the breach by the defendant.
The ground urged is that the court erred in refusing to admit in
evidence the certificate of incorporation dated December 30, 1930.
It is stated that the corporation was in existence at the time the
contract was entered into by the parties. It is contended, however,

that subsequently the corporation changed its name to the Wilson-Athletic Goods Company; that this company was the proper party defendant, but for want of proper service of summons the court was without jurisdiction to enter judgment.

The position taken by counsel would seem to rest upon the theory that the defendant was sued as a party defendant under a wrong name; that it should have been sued under the name of the Wilson Athletic Goods Company. It is apparent from the record that the defendant failed to plead a misnomer in abatement, and suffered judgment to be obtained. Therefore, it is not in a position to complain. The rule is that when the party intended to be named in the judgment is sued by a wrong name, the party so sued will be affected as though he were properly named therein, unless he takes advantage of the misnomer by plea in abatement in such suit, and the Supreme Court in Fond v. Ennis, et al., 63 Ill. 341, in applying this rule said:

"It may happen that the name of some of the parties is incorrectly stated. The weight of authority is, if the writ is served on a party, by a wrong name, intended to be sued, and he fails to appear and plead the misnomer in abatement, and suffers judgment to be obtained, he is concluded, and in all future litigation may be connected with the suit or judgment by proper averments; and when such averments are made and proved, the party intended to be named in the judgment is affected as though he were properly named therein. Freeman on Judgments, sec. 154, page 125. Reference is made to the case cited from 15 Ill. supra, to National Bank v. Jagers, 31 Md. 38; Ins. Co. v. French, 18 Howard (U.S.) 404; Smith v. Bowker, 1 Mass. 76; Oakley v. Giles, 3 East, 167; Smith v. Patten, 6 Taunton, 115; Crawford v. Satchwell, 2 Strange, 1218."

See also Pennsylvania Co. v. Sloan, 125 Ill. 72.

The defendant failed to file an affidavit of merits pleading a misnomer in abatement, and the trial court upon the state of the pleading was fully justified in sustaining the plaintiff's objection to the admission of the evidence. The amended affidavit of merits offered did not comply with the rule hereinabove mentioned.

The evidence fully sustains the conclusion reached by the trial court, and this evidence stands uncontradicted and unimpeached, and the court was warranted in directing the jury to find the issues for the plaintiff and in entering judgment upon the finding of the jury.

There being no error in the record the judgment is affirmed.

JUDGMENT AFFIRMED.

WILSON, P.J. AND HALL, J. CONCUR.

There being no error in the record the judgment is

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36056

JULIUS B. GINSBERG,

Appellee,

v.

BENJAMIN I. MORRIS and DAVID
LABOWITCH,

Appellants.

24
APPEAL FROM

7
MUNICIPAL COURT

OF CHICAGO.

270 I.A. 616²

Opinion filed March 29, 1933

MR. JUSTICE NEBEL DELIVERED THE OPINION OF THE COURT.

This is an appeal by the defendants from a judgment entered in the Municipal Court of Chicago in the sum of \$543.75, recovered by the plaintiff in an action against the defendants upon a bond secured by a trust deed upon certain real estate therein described. Trial was had before the court without a jury, and at the close of the hearing, judgment was entered as above stated.

The defense to this action is that as a bondholder the plaintiff was restricted in bringing an action by the terms of the trust deed securing the payment of said bond, and that reference is made upon the face of the bond to the terms of the trust deed, which provided in effect that the exclusive right of action was in the trustee named in this deed; and as a further defense, the defendants raise the question of usury.

The material provisions of the note in question are:

"Bond 109 on January 31, 1931, for value received, Benjamin I. Morris and David Labowitch, both of Chicago, jointly and severally, promise to pay to bearer or registered owner thereof, if registered, the sum of \$500.00, together with interest thereon, from January 1, 1925, at the rate of 8% per annum, * * * This bond is one of a series of 490 bonds. * * * For a full description of which and the terms and conditions under which this bond is issued, secured and held, reference is made to said deed of trust. * * *"

The question of non-negotiability of notes and bonds containing similar conditions to those contained in the bond in question, had been considered by courts of appellate jurisdiction in this state, and the latest expression of the Supreme Court upon

the question appears in the case of Pflueger v. Broadway Trust and Savings Bank, 351 Ill. 170.

In that case the court held that a recital in a promissory note or bond, or a reference in it to some other instrument, in order to destroy its negotiability must be of such a nature that the recital or reference to the other instrument qualifies or makes uncertain or conditional the promise to pay, and if the note or bond merely recites that it is a part of a certain agreement which does not affect the promise to pay, it is negotiable.

The bond in question contains a promise by the defendants to pay a sum certain upon a fixed date. This bond was not rendered non-negotiable by the provision in the note so as to qualify or make uncertain the promise to pay. Reference is made in the bond to the deed of trust for a full description of the terms and conditions under which the bond is issued. The answer of the Supreme Court to this question in the case of Pflueger v. Broadway Trust and Savings Bank, supra, is clearly applicable to the instant case, and is, in effect, as follows:

"Plaintiff in error's argument that the debentures are non-negotiable is based primarily on the clause therein which recites that the debentures are issued under a certain trust agreement, 'to which trust agreement reference is hereby made for a statement of the terms under which the said debentures are issued and the rights and obligations of the company, of the trustee and of the respective holders of the said debentures under the said trust agreement.' Plaintiff in error contends that this clause so modifies the unconditional promise to pay that it renders the debentures non-negotiable. In order for the clause above quoted to render the debenture non-negotiable it must be of such a nature that it qualifies or makes uncertain or conditional the unconditional promise to pay. Whether this clause modifies the unconditional promise to pay must be determined from the writing itself and not from extrinsic evidence. Section 3 of the Negotiable Instrument act provides that an unqualified order or promise to pay is unconditional within the meaning of the statute though coupled with an indication of a particular fund out of which reimbursement is to be made, or a particular account to be debited with the amount, or a statement of the transaction which gives rise to the instrument; but an order or promise to pay out of a particular fund is not unconditional.

If a prospective purchaser wanted to buy these debentures, he would, upon reading them, first find an unconditional

promise to pay a sum certain of money to bearer at a fixed future time. The quoted reference to the trust agreement in the debenture does not affect this unconditional promise to pay but only means that the holder is referred to the trust agreement for his rights under that agreement."

There remains to be considered the question of usury. The point is made in this case that the court erred in denying defendants' offer to prove certain facts bearing upon the question of usury. The plaintiff was the owner and holder of a negotiable instrument for value and before maturity, and it was necessary for the defendants to show that the plaintiff had knowledge that the bond at the time he became the legal holder was tainted with usury. The plaintiff was called as a witness under Section 33 of the Municipal Court Act, and was asked the following question on behalf of the defendants:

"Mr. Myerson: You knew, did you not, Mr. Ginsberg, that these bond houses were charging a commission for making loans?"

which upon objection was sustained.

The defendants then offered to prove by this witness, substantially, that it was common knowledge on the street that Greenebaum Sons Investment Company, and other bond houses, charged a substantial commission for the sale of their bonds to purchasers; that the witness having purchased bonds from this Investment Company for upwards of eight years had notice at the time he purchased this bond, or acquired it, that a commission had been paid and that it was a usurious transaction. The offer to prove indicated the inadmissibility of the evidence. What commission was charged in other transactions by this or other brokers has no material bearing on the question of usury in the instant case, and the fact that the plaintiff purchased bonds from an investment company would not of itself indicate that he had knowledge that a commission had been paid to the broker in the instant transaction. This court is unable

There remains to be considered the question of warranty. The point is made in this case that the court erred in denying defendants' offer to prove certain facts bearing upon the question of warranty. The plaintiff was the owner and holder of a negotiable instrument for value and before maturity, and it was necessary for the defendants to show that the plaintiff had knowledge that the bond at the time he became the legal holder was tainted with warranty. The plaintiff was called as a witness under Section 25 of the Municipal Code, 1907, and was asked the following question on behalf of the defendants:

"Q. Now, you say, that when you bought the bond, you were told that it was a commission for the plaintiff?"

which was objected to and sustained.

The defendants then offered to prove by this witness, and- specifically, that it was common knowledge of the entire bond-owning community, and other bond owners, that the plaintiff was a commission for the sale of their bonds to purchasers; that the witness having purchased bonds from this Investment Company for a period of eight years had notice at the time he purchased the bond, or acquired it, that a commission had been paid and that it was a common transaction. The offer to prove indicated the inadmissibility of the witness. That commission was charged in other transactions by this or other brokers had no material bearing on the question of warranty in the instant case, and the fact that the plaintiff purchased bonds from an investment company would not of itself indicate that he had knowledge that a commission had been paid on the broker in the instant transaction. This court is unable

to determine from the offer that the transaction was tainted with usury. The offer being uncertain, the trial court was fully justified in ruling as it did. Our conclusion is that the record is free from error, and the judgment is accordingly affirmed.

JUDGMENT AFFIRMED.

WILSON, F.J. AND HALL, J. CONCUR.

As this Court sees, and the judgment is accordingly affirmed.

36231

THE PEOPLE OF STATE OF ILLINOIS,
Defendant in Error,

vs.

LIONEL A. SHERWIN,
Plaintiff in Error.

In the Matter of the Commitment of
Lionel A. Sherwin, Plaintiff in Error,
for Direct Contempt of Court in the
case of Chicago Title & Trust Co.,
Trustee, vs. Sam Rubin et al., Circuit
Court of Cook County, No. 2284973.

ERROR TO CIRCUIT COURT
OF COOK COUNTY.

270 I.A. 616³

MR. PRESIDING JUSTICE McSURELY
DELIVERED THE OPINION OF THE COURT.

In certain proceedings in the case of Chicago Title & Trust Co., Trustee, vs. Rubin et al., then pending in the Circuit court of Cook county before Judge Philip J. Finnegan, L. A. Sherwin, an attorney at law practicing in this county, was adjudged in direct contempt of court and sentenced to confinement in the county jail of Cook county for fifteen days. By this writ of error Sherwin seeks the reversal of this order.

The instances said to constitute the contempt are that Sherwin presented a paper to the court stating that it was a stipulation that he be substituted as attorney for certain defendants in lieu of certain other attorneys who were the attorneys of record appearing for these defendants. The paper was not such a stipulation. This document also purported to contain the signatures of these defendants authorizing L. A. Sherwin, in lieu of their former counsel, to enter their appearance. It developed that these defendants had not signed this document.

In a direct contempt the only record required is the order of commitment, which must set out the facts constituting the offense so fully and certainly as to show that the court was authorized to make the order. People ex rel. Fein v. Feinberg, 266 Ill. App. 306. The order must be considered as a true

THE COURT OF APPEALS IN THE
CITY OF NEW YORK

IN SENATE
JANUARY 1, 1907
IN THE MATTER OF THE ESTATE OF
ALFRED A. BRUNSWICK, Plaintiff in Error,
vs.
THE NEW YORK LIFE INSURANCE CO., Defendant in Error.
JAMES C. BRUNSWICK, Plaintiff in Error,
vs.
THE NEW YORK LIFE INSURANCE CO., Defendant in Error.
JAMES C. BRUNSWICK, Plaintiff in Error,
vs.
THE NEW YORK LIFE INSURANCE CO., Defendant in Error.

270 I.A. 616

THE COURT OF APPEALS IN THE
CITY OF NEW YORK

In certain proceedings in the case of James C. Brunswick
vs. The New York Life Insurance Co., the court in the second
of said cases before Judge Smith J. Thompson, J. J. Thompson, J.
of the court in this case, was asked in this
case of court and sentenced to confinement in the county jail
of Cook county for fifteen days. By this writ of error wherein
seeks the reversal of this order.
The instance said to constitute the complaint was that
wherein presented a paper to the court stating that it was a sign-
fication that he be executed as attorney for certain defendants
in lieu of certain other attorneys who were the attorneys of rec-
ord appearing for these defendants. The paper was not such a
signification. This document also purported to contain the sign-
ature of these defendants authorizing J. A. Brunswick, in lieu of
their former counsel, to enter their appearance. It developed
that these defendants had not signed this document.
It is a slight mistake the only remedy provided is the
order of dismissal, which must not be the Court annulling the
order as to the defendants as it was that the Court was
authorizing to make the order. James C. Brunswick
vs. The New York Life Insurance Co. The order must be maintained as a rule

statement of the facts. Amieal v. Ursus Motor Co., 316 Ill. 336.

The order before us recites that on July 15, 1932, there was heard before the court the charge of the direct contempt committed by L. A. Sherwin, an attorney and officer of the court; that the court gave L. A. Sherwin the opportunity of presenting evidence, statements, proofs, explanations and arguments, of which Sherwin fully availed himself, and after having heard all the evidence so presented and such explanations and arguments, the court found that there was pending and undisposed of in the court a proceeding in equity, entitled Chicago Title & Trust Co., a corporation, as Trustee, vs. Sam Rubin et al.; that David Plotnick and Anna Plotnick, his wife, were with others defendants in said proceeding; that at this time and for a long period of time previous Isadore Isenberg and Michael M. Isenberg, attorneys of the State of Illinois, practicing under the name of Isenberg & Isenberg, were attorneys of record for said David Plotnick and Anna Plotnick in the aforesaid cause; that on June 25, 1932, while the court was in session for the transaction of its judicial business in the county of Cook and State of Illinois, said L. A. Sherwin appeared before the court and presented to the court a paper entitled "Substitution of Solicitors," purporting to authorize L. A. Sherwin to enter the appearance of said David Plotnick and Anna Plotnick in the case of Chicago Title & Trust Co., a corporation, as Trustee, vs. Sam Rubin et al., in lieu and in place of Isenberg & Isenberg; that Sherwin -

"then and there stated to the Court that he was making a motion for the substitution of solicitors in said cause and that he had a stipulation for such purpose and that the paper above mentioned, which he then and there handed to the Court, was such a stipulation. That by such representation so made by said Sherwin said Sherwin conveyed to the Court and intended to convey to the Court the information that such paper was duly signed by David Plotnick and Anna Plotnick and by the solicitor or solicitors of record in said cause for said Plotnicks for whom said Sherwin was then and there substituting his appearance.

statement of the fact, Michael v. David, 100 Ill. 235.
The other parties to the suit on July 12, 1902, were
and being before the court the names of the other parties and
called by J. A. Sherrin, an attorney and officer of the court;
that the court was J. A. Sherrin the president of the
evidence, witnesses, and arguments, and arguments, by which
Sherrin (the witness) stated, and after hearing all the ev-
dence he presented and such explanations and arguments, the court
found that there was pending and undispensed of in the court a
proceeding in equity, entitled Michael v. David, 100 Ill. 235.
Michael, as plaintiff, vs. David as defendant, and other parties,
and other parties, his wife, with other parties in and
proceeding, that as late as July 12, 1902, the parties of the
the estate of David and Michael M. Sherrin, attorneys of the
State of Illinois, residing under the name of Michael M. Sherrin
and, were attorneys of record for said David Michael and Anna
Michael in the aforesaid cause; that on June 25, 1902, while the
court was in session for the transaction of its judicial business
in the county of Cook and State of Illinois, said J. A. Sherrin
appeared before the court and presented to the court a paper en-
titled "Petition of Michael M. Sherrin," petition for admission, J. A.
Sherrin to enter the appearance of said David Michael and Anna
Michael in the case of Michael v. David, 100 Ill. 235.
as Michael v. David, 100 Ill. 235, in and in place of Michael
Michael, said Sherrin -
"That the same being in the court that he was willing to waive
for the submission of evidence in said cause and that he had a
petition for admission to the court and that the court was willing
to admit him as an attorney and officer of the court, was a petition
that he was willing to make by said David Michael and Anna
Michael as the court and intended to enter in the court the in-
formation that was then and there made by David Michael and
Anna Michael and by the petition of Michael M. Sherrin of record in
said cause for said Michael and Anna Michael was then and
there submitted and accepted."

That thereupon and then and there said Michael S. Isenberg appeared before the Court and questioned the right of said respondent to substitute himself in place of said Isenberg and his brother as solicitors in said cause for said David and Anna Plotnick. That thereupon the Court asked respondent if David Plotnick and Anna Plotnick had signed said substitution of solicitors so presented as aforesaid to the Court and said respondent then and there stated:

That said signatures were the genuine signatures of David and Anna Plotnick and after further questioning by the Court then and there stated that the signatures of said David and Anna Plotnick had been attached to said substitution of solicitors by one Lyons, the son-in-law of said David and Anna Plotnick.

The Court finds that the representations so made by said respondent to the Court at said time were and are, and were known by said Sherwin to be false. That neither David Plotnick, Anna Plotnick or said Lyons signed the names of David Plotnick and Anna Plotnick to said substitution of solicitors so presented to the Court.

The Court further finds that the said Isenberg and Isenberg did not sign said substitution of solicitors or any stipulation in regard thereto and then and there made the claim in Court that no proper notice of the application of said Sherwin to the Court for an order of substitution of solicitors had been served upon the attorneys of record in said cause for said David and Anna Plotnick. The Court finds that no proper notice of such application was given to said attorneys of record by said Sherwin.

That such conduct of said L. A. Sherwin is misrepresenting the true facts to the Court tended to deceive the Court and constituted a direct contempt committed upon the Court in the presence of the Court and while the Court was in session for the transaction of judicial business and that the acts of said L. A. Sherwin constituting such contempt tended to impede and obstruct justice in said court.

The Court further finds that said L. A. Sherwin, who is now here present in open Court, is, by reason of the aforesaid conduct of said L. A. Sherwin, guilty of a direct contempt of this Court in open Court."

The burden of plaintiff in error's brief in this court seems to be that the evidence and explanations he presented to the court did not justify the finding of facts in the order. However, as no bill of exceptions is proper in a proceeding of this sort, it is immaterial as to what evidence or arguments were presented to the trial court. We infer from the brief of plaintiff in error that the so-called evidence consisted merely of matters which the court permitted him to present as tending to explain the direct contempt which had been committed in the presence of the court. Plaintiff in error told the court that the paper he was presenting was a stipulation to substitute attorneys, but when the paper was examined

it was found that the attorneys of record had not signed it. Plaintiff in error must have known that a stipulation means an agreement, signed by all the parties concerned, and that when he presented a paper not signed by the counsel for whom he was seeking to have himself substituted, and represented to the court it was a stipulation for this purpose, he made a false statement for the purpose of deceiving the court.

The order also shows that plaintiff in error represented that the signatures of David Plotnick and Anna Plotnick on the paper purporting to be a substitution of solicitors, were the genuine signatures of David and Anna Plotnick, but that subsequently, on being examined, plaintiff in error admitted that these were not the genuine signatures of these persons. The court therefore found that this representation was false and known to Sherwin to be false. After it had been made to appear that these were not the genuine signatures of David and Anna Plotnick, plaintiff in error then claimed the signatures were made by one Lyons, a son-in-law of said parties. The court found that none of these parties signed the name of David Plotnick and Anna Plotnick to the substitution of solicitors.

Plaintiff in error is an experienced practitioner at this bar, and, unfortunately for him, has more than once been found guilty of contempt for indulging in tricky conduct. It is a commonplace to say that attorneys must deal honestly and truthfully with the court. Failure to do this merits punishment. Courts have inherent power to punish for contempt committed in the presence of the court and may deal with the offender without hearing any evidence. People v. Andelman, 346 Ill. 149. Plaintiff in error has cited many cases but none of them is contrary to the rules of law we have stated.

The order of contempt shows a simple case of false statements

It was found that the signature of Henry was signed in
violation in error was made. Henry was a witness in the
proceedings, signed by all the parties concerned, and was not
presented a paper and signed by the witness in error in the
ing to have himself substituted, and represented to the court in
was a violation for this purpose, he made a false statement for
the purpose of deceiving the court.

The order also shows that plaintiff in error represented

that the signature of David Fisher was also placed on the

paper purporting to be a substitution of witnesses, were the

executed signatures of David and John Fisher, and that when

presented, as being genuine, plaintiff in error admitted that these

were not the genuine signatures of those persons. The court there

fore found that this representation was false and wrong in law

in its effect. After it had been made in error that these were not

the genuine signatures of David and John Fisher, plaintiff in

error then claimed the signatures were made by one Lyons, a non-

party of said parties. The court found that none of these per-

sons signed the name of David Fisher and thus violated to the

substitution of witnesses.

Plaintiff in error in an attempted concealment of this

fact, and, unfortunately for him, has more than once found

himself in contact for liability in every country. It is a con-

stantly to his best advantage that this liability and liability

with the court. Plaintiff in error made his statement. These

have inherent power to punish for contempt committed in the presence

of the court and may deal with the offender without hearing any

evidence. People v. Anderson, 240 Ill. 100. Plaintiff in error

has cited many cases but none of them is contrary to the rules of

law we have stated.

The court of appeals where a single case of false witness

made for the purpose of procuring an order from the court. We see no reason to disturb the judgment, and it is affirmed.

AFFIRMED.

Witchett and O'Connor, JJ., concur.

PEOPLE OF THE STATE OF ILLINOIS,
Defendant in Error,

vs.

HATTIE JONES, alias JOHNSON,
Plaintiff in Error.

ERROR TO MUNICIPAL COURT
OF CHICAGO.

270 I.A. 616⁴

MR. PRESIDING JUSTICE McSURELY
DELIVERED THE OPINION OF THE COURT.

An information was lodged, charging defendant with encouraging Elizabeth Bethke, a female person sixteen years of age, to become a delinquent child in that defendant harbored her for the purpose of prostitution. Upon trial by the court defendant was found guilty and sentenced to one year in the House of Correction. She seeks a reversal in this court.

We need to notice only one point, namely, whether the charge was proven beyond a reasonable doubt.

The complaining witness, Elizabeth Bethke, testified that she went to the apartment of defendant at 4888 Vincennes avenue, Chicago, with a Mr. Lester; that defendant told witness she was "to go to bed with a fellow;" that she did so and had sexual relations with a man at defendant's place, for which she received \$3, and gave \$1 to defendant and \$2 to Lester; that this was the only man with whom she had sexual relations at this place; that she stayed there three days; that she saw other girls there having sexual relations with other men. On cross-examination the witness said her home was in Milwaukee; that she came to Chicago to look for work and was taken by a fellow to a room on 47th street and stayed there with him for about two weeks; that afterward she was taken by Carl Lester to a place kept by Mrs. Willis and stayed there with him for about a month; that afterward she went to a place on South Parkway; this was before she went to defendant's place; that she came to defendant's place about noon with Carl Lester; that there were also present the defendant, a Mr. Johnson and a Mr. Taylor; that Lester

STATE OF ILLINOIS,
County of Cook.

vs.

WILLIAM J. BAKER, alias BAKER,
Plaintiff in Error.

IN SENATE

NOVEMBER 1916

280 I.A. 616

DELIVERED FOR THE COURT
BY THE CLERK OF THE COURT

An information was lodged, charging defendant with carrying
on his person, a female person sixteen years of age, to be-
come a prostitute, and in that defendant harbored her for the pur-
pose of prostitution. Upon trial by the court defendant was found
guilty and sentenced to one year in the House of Correction. The
state a verdict in this court.

It was to be noted only one point, namely, whether the charge
was proven beyond a reasonable doubt.

The complaining witness, Elizabeth Brown, testified that
she went to the apartment of defendant at 4385 Vincennes Avenue,
Chicago, with a Mr. Lester; that defendant told witness she was
"to go to bed with a fellow"; that she did so and had sexual rela-
tions with a man of defendant's acquaintance, for which she received \$5,
and gave \$1 to defendant and \$4 to Lester; that this was the only
man with whom she had sexual relations at this place; that she
stayed there three days; that she saw other girls there having sexual
relations with other men. On cross-examination she witness said
her home was in Milwaukee; that she came to Chicago to look for work
and was taken by a fellow to a room on 47th Street and stayed there
with him for about two weeks; that afterward she was taken by Carl
Baker to a place kept by Mrs. Willie and stayed there with him for
about a month; that afterward she went to a place on South Parkway;
that she before she went to defendant's place; that she came to
defendant's place about noon with Carl Baker; that after that time

left her there, saying that she was "to stay there and hustle;" that the man with whom she had sexual relations at defendant's place was a Chinaman whom she had never seen before; that defendant became angry at her and witness moved out; that defendant told Lester that she, witness, "was a dope fiend and he would have to move out."

Defendant testified that she had lived at 4358 Vincennes avenue for seven years; that there were three bedrooms in the apartment, one occupied by herself and the other two rooms occupied by a Mr. Johnson and a Mr. Taylor; that she had been arrested twice by officer Goldstein but was never convicted; that Carl Lester brought the complaining witness to her home, saying he wanted a room for himself and wife; that defendant told him she had no room; they stayed about fifteen minutes and left; neither of them ever returned again; that both Johnson and Taylor were present at the time; defendant asserted that she had never rented a room at any time for immoral purposes and that no Chinaman had ever visited her home; that she saw the complaining witness only this one time and that she never stayed at her house and never remained for three days; that she was there not over fifteen minutes just one time.

Johnson testified that he was a painting contractor and roomed in defendant's apartment; that he saw the complaining witness when Lester brought her to the house and asked for a room for him and her; that they remained there about ten to fifteen minutes, and the witness never saw her again; that the only roomers in the house were the defendant, Taylor, and himself; that there were no girls in the house.

Taylor also testified, saying he was present when complaining witness came with Lester to defendant's apartment; that Lester said he wanted a room for himself and his wife; that they were there only about fifteen minutes, and that Elizabeth Bethke was not there

"left her there, saying that she was 'to stay there and nurse';

that the man with whom she had sexual relations at defendant's place was a Chinaman whom she had never seen before; that defendant

became angry at her and witness moved out; that defendant told

witness that she, witness, "was a loose thing and he would have to

move out."

Defendant testified that she had lived at 1235 Wisconsin

avenue for seven years; that there were three bedrooms in the

apartment, one occupied by herself and the other two rooms occu-

pled by a Mr. Johnson and a Mr. Taylor; that she had been arrested

twice by Officer Holstede but was never convicted; that Carl Westat

strongly the complaining witness to her home, saying he wanted a room

for himself and wife; that defendant told him she had no room; they

stayed about fifteen minutes and left; witness at that time was

turned again; that both Johnson and Taylor were present at the time;

defendant asserted that she had never rented a room at any time for

immoral purposes and that no Chinaman had ever visited her home;

that she saw the complaining witness only once and that

she never stayed at her house and never remained for three days;

that she was there not over fifteen minutes last one time.

Johnson testified that he was a painting contractor and

remained in defendant's apartment; that he saw the complaining witness

when Lesser brought her to the house and asked for a room for him

and her; that they remained there about ten to fifteen minutes, and

the witness never saw her again; that the only roomers in the house

were the defendant, Taylor, and himself; that there were no girls

in the house.

Taylor also testified, saying he was present when Lesser

and witness came and Lesser is defendant's apartment; that Lesser

told he rented a room for himself and his wife; that they were there

only about fifteen minutes, and that Elizabeth Burke was not there

three days, and that no girls were ever there for immoral purposes. This witness said he was a helper to Johnson with contract painting work and also helped around the apartment and generally knew what was going on; that the complaining witness never went to bed there with any man.

The testimony of the complaining witness is not convincing. She was admittedly a young woman of loose habits, taking up with men promiscuously and living with them at various places; there is a suggestion in the testimony that she was a "dope fiend," which probably explains, in part, the uncertain character of her testimony. On the other hand, the testimony on behalf of defendant is positive and unequivocal to the effect that complaining witness was at defendant's apartment only one time, and for a very few minutes.

In the face of this record it cannot be said that the quantum of proof was sufficient to establish defendant's guilt beyond all reasonable doubt.

The judgment is reversed and the cause remanded.

REVERSED AND REMANDED.

Matchett and O'Connor, JJ., concur.

three days, and that no girls were ever there for immoral purposes.
This witness said he was a helper in the house with various jobs.
and work and also helped around the apartment and generally knew
what was going on; that the complaining witness never went to bed
there with any man.

The testimony of the complaining witness is not convincing.
She was actually a young woman of loose habits, living as with men
promiscuously and living with them at various places; there is a
suggestion in the testimony that she was a "stage hand," which
further confirms, in fact, the probable character of her testimony.
In the first part, the testimony as to the fact that she was
not acquainted with the alleged complaining witness was of the
lowest quality, and that she was only a very low witness.
In the face of this, it cannot be said that the
evidence is such as to establish the defendant's guilt.
The defendant is innocent.

The defendant is returned and the case continued.

REVEREND AND HONORABLE.

Witness and Defendant, etc., returned.

36422

JOSEPH SCHNEIDERMAN,
Appellee,

vs.

HOME BANK AND TRUST CO., a
Corporation, et al.,
(Defendants.)

On Appeal of ELLESWORTH T. MARTIN,
Appellant.

APPEAL FROM CIRCUIT COURT
OF COOK COUNTY.

270 I.A. 617¹

MR. PRESIDING JUSTICE MCSURELY
DELIVERED THE OPINION OF THE COURT.

This is an appeal by the holder of a second mortgage from a decree of partial foreclosure of a first mortgage, pursuant to the bill to foreclose filed by complainant, alleging the default in payment of three interest coupon notes held by him aggregating \$1400.

The bill to foreclose the second mortgage was filed July 31, 1931, by Ellsworth T. Martin, the appellant; August 6, 1931, complainant filed his bill to foreclose; by stipulation the two causes were consolidated. The question presented on this appeal is, whether the complainant was the owner of the uncanceled coupon interest notes described in his bill to foreclose, the defendant asserting that these notes had been paid.

The first trust deed with notes, for \$50,000, was executed by Wolf Cowen and Fanny Cowen, his wife, for a loan made by the Lumbermen's Mutual Casualty Company; the evidence tended to show that complainant had loaned \$1500 to Erwin Cowen, receiving his note indorsed by his brother, Harry Cowen; these men are sons of Wolf Cowen; this note matured in April, 1931; complainant made numerous demands upon Erwin Cowen for payment, without success; he then sought payment from the indorser, Harry Cowen, at first without success; finally, in August, 1931, Harry Cowen obtained the coupon interest notes of the first mortgage of Wolf and Fanny Cowen, which matured in June, 1931, by paying the Lumbermen's

JOSEPH ROBERTSON

Appellant

vs.

HOME BANK AND TRUST CO.,

Corporation, et al.,
(Defendants.)

On Appeal of WILLIAM T. MARTIN,
Appellant.

MR. PRESIDING JUSTICE MAHERLY
DELIVERED THE OPINION OF THE COURT.

This is an appeal by the holder of a second mortgage from a decree of partial foreclosure of a first mortgage, pursuant to the bill to foreclose filed by complainant, alleging the default in payment of three interest coupon notes held by him representing

\$1400.

The bill to foreclose the second mortgage was filed July 21, 1931, by William T. Martin, the appellant; August 6, 1931, complainant filed his bill to foreclose; by stipulation the two causes were consolidated. The question presented on this appeal is, whether the complainant was the owner of the unmortgaged coupon interest notes detailed in his bill to foreclose, the defendant asserting that these notes had been paid.

The first trust deed with notes, for \$50,000, was executed by Wolf Gowan and Harry Gowan, his wife, for a loan made by the Landoverman's Mutual Casualty Company; the evidence tended to show that complainant had loaned \$1000 to Edwin Gowan, receiving his note indorsed by his brother, Harry Gowan; these two are sons of Wolf Gowan; this note matured in April, 1931; complainant made numerous demands upon Edwin Gowan for payment, without success; he then sought payment from the indorser, Harry Gowan, at first without success; finally, in January, 1932, Harry Gowan obtained the coupon interest notes of the first mortgage of Wolf and Harry Gowan, which matured in June, 1931, by paying the Landoverman's

Mutual Casualty Company the amount due thereon and receiving the notes from the company uncanceled; Harry Cowen thereupon offered to give these coupon notes to the complainant in payment and satisfaction of his liability on the note of Erwin Cowen; complainant accepted this proposition and received the coupon interest notes and delivered the Erwin Cowen note to Harry Cowen. The bookkeeper and cashier of the Lumbermen's Mutual Casualty Company testified that this company made the loan to Wolf Cowen and still owns the principal note secured by the trust deed; that the coupon notes in the possession of complainant represent the interest falling due June 12, 1931; that this interest was paid in full August 5th by Harry Cowen and the notes were delivered to him at that time.

When the complainant produced the notes in question upon the hearing, presumably he was the owner. Feulner v. Gillam, 216 Ill. App. 88; Henry v. Eddy, 34 Ill. 508; Curtiss v. Martin, 20 Ill. 557; New Haven Mfg. Co. v. New Haven Pulp & Board Co., 76 Conn. 126; Brannan, "Negotiable Instruments," 4th ed., p. 243.

The crucial question is, When Harry Cowen paid the Lumbermen's Mutual Casualty Company the amount due on these notes and received them uncanceled, was this payment or a purchase of the notes? Certain aspects suggest persuasive grounds for entertaining a suspicion that Harry Cowen paid these notes and did not purchase them. However, upon the naked record we are constrained to hold that the transaction was a purchase. "If a bill or a note is paid after its maturity by a stranger to the paper, it will in general be held to be a purchase and not a payment of the instrument." 3 Corpus Juris, 583. This is supported by citations of cases from many jurisdictions. In Dent v. Matthews, 202 Mo. App. 451, it was held that where a third party furnishes the consideration for the surrender of a note, even though done at the instance

of the maker, and the note is delivered over by the holder to the third party, the presumption is that a purchase and not a payment was intended. In Stark v. Scherf, 207 E. W. 863, it was held that where a stranger to the instrument paid the money it became a question of intention whether it was in payment of the note or in purchase. Among other cases holding that payment for the receipt of a note by a stranger is presumptively a purchase and not payment, are Citizens' Trust Co. v. Caddick Milling Co., 210 E. W. 774; Peoples State Bank v. Dryden, 91 Kan. 216; Cantrell v. Davidson, 190 Mo. App. 410; Wing v. Union Central Life Ins. Co., 191 Mo. App. 361; Brannan, "Negotiable Instruments," 4th ed., p. 752.

Defendant cites some cases in opposition, but these can be distinguished. In Hall v. Sarum, 85 Ill. App. 860, the holder of the interest coupons presented them for payment at the bank where they were payable and received payment in the same manner as in the case of previously maturing coupons. In a foreclosure proceeding the bank contended that it had advanced the payment of the last two interest coupons and was a purchaser. The court held that from the nature of the previous transactions between the parties, the payment by the bank was not a purchase but payment. In the instant case, so far as the record shows, Harry Cowen paid for and received the notes from the Casualty Company for the first time. There were no previous transactions between him and the Casualty Company. In Pearce v. Bryant Coal Co., 121 Ill. 590, Pearce, who advanced the money in payment of coupons, was a trustee and the financial agent of the makers of the notes and had been repaid the amount of the money he had advanced; the court held that the preponderance of the evidence showed clearly that Pearce paid the coupons and did not purchase them. In Bennett v. Chandler, 199 Ill. 97, the coupon interest notes were placed in the hands of an agent for collection, but instead of collecting them he remitted the

amount thereon out of his own funds without the knowledge of either the mortgagee or mortgagor, and indorsed his principal's name on the back of the interest coupons. It was held that he had not purchased these notes and had no authority to indorse his principal's name. In the instant case the notes are payable to bearer and there is no evidence that Harry Cowen was representing the makers of the notes.

It was open to appellant to subpoena Wolf Cowen and Erwin and Harry Cowen, and by their testimony attempt to overcome the presumption that the transaction was a purchase and not payment. The mortgagor, Wolf Cowen, would be especially interested, for if the notes were paid his indebtedness would be lessened, otherwise, if the notes were purchased. The fact that he does not question the decree indicates that the notes were not paid. None of these persons testified, so that we are left with the legal presumption that Harry Cowen purchased the notes. The cancellation of his obligation to complainant was a sufficient consideration for the transfer of the coupon interest notes to complainant.

We see no convincing reason which would justify us in reversing the decree. It is therefore affirmed.

AFFIRMED.

Matchett and O'Connor, JJ., concur.

...not known out of the two books which the knowledge of either
the names of the parties, and indicated his principal's name on
the back of the interest coupons. It was held that he had not
purchased these notes and had no authority to indicate his principal's
name. In the instant case the notes are payable to bearer
and there is no evidence that Harry Cowen was representing the
maker of the notes.

It was open to appellants to subpoena Wolf Cowen and Edwin
and Harry Cowen, and by their testimony attempt to overcome the
presumption that the transaction was a purchase and not payment.
The appellants, Wolf Cowen, could be essentially impeached, for if
the notes were paid his indebtedness would be satisfied, otherwise
if the notes were purchased. The fact that he did not mention the
debtor indicates that the notes were not paid. None of these were
substantiated, and we are left with the legal presumption that
Harry Cowen purchased the notes. The conclusion at his obligation
to complainant was a sufficient consideration for the transfer of
the notes interest under the commission.

We see no convincing reason which would justify us in
reversing the decree. It is therefore affirmed.

REVEREND

REVEREND and O'Connor, JJ., concur.

36434

NICK ORTOLEVA,

Appellee,

vs.

THE JOHN HANCOCK MUTUAL LIFE
INSURANCE COMPANY OF BOSTON,
MASSACHUSETTS, a Corporation,
Appellant.

APPEAL FROM MUNICIPAL COURT
OF CHICAGO.

270 I.A. 617²

MR. PRESIDING JUSTICE MCGURLEY
DELIVERED THE OPINION OF THE COURT.

Plaintiff brought suit as the beneficiary in two policies issued by defendant on the life of his wife, Grace Ortoleva, and upon trial by the court had judgment for \$500, from which defendant appeals. The policies not only provided for payment upon the death of the insured, but also for an additional amount in case death was caused by accident, as follows:

"upon receipt of due proof that the insured *** has sustained bodily injury solely through external, violent and accidental means *** the company will pay *** an accidental benefit equal to the face amount of insurance stated in this policy."

Plaintiff alleged that on February 22, 1931 Grace Ortoleva died of bodily injuries sustained through external, violent and accidental means. Defendant denies this.

The insured lived with her husband, the plaintiff, and their four children and a brother of plaintiff. On the evening before she died she was in good health but was suffering from toothache; all of the family retired, but about six o'clock the next morning, which was Sunday, the brother smelled gas, and with plaintiff went to the kitchen and found the insured sitting by and leaning upon the combination coal and gas stove; she had a blanket about her; there was no coal fire in the stove; on top of the stove was a pillow and upon this a hot water bottle; her face was resting on the hot water bottle; on the stove was a little pan half full of water; the gas jets in the stove were turned on about a quarter

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THE NEW YORK LIFE INSURANCE COMPANY, INC. 1000

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but were unlighted and gas was escaping; the brothers carried her away and put her on the bed; apparently she was just dying; they sent immediately for a pulmotor squad of city firemen, who worked on her for some time but without avail.

Defendant argues that these facts indicate that insured committed suicide. We cannot agree with this conclusion. The most natural explanation of the circumstances is that she was attempting to obtain relief from toothache; she lighted the gas and heated some water, put this in the hot water bottle and, leaning over the stove, put her face on the bottle and the pillow and dozed; in the meantime the water left in the pan, which was immediately over the gas jets, boiled over as she slept and the water spilled on the gas jets, extinguishing them. The presence of the pillow and the hot water bottle are wholly inconsistent with the idea of suicide, while the blanket, which defendant argues indicates suicide, was obviously worn because of the cold weather.

Death caused by inhaling illuminating gas comes within the provision of a policy indemnifying against injury caused by external, violent and accidental means. Paul v. Travelers' Ins. Co., 112 N. Y. 472; Healey v. Mutual Accident Assoc., 133 Ill. 556; Schachner v. Employers' Liability Assur. Corp., 268 Ill. App. 503.

Defendant argues that there was no proof of claim that the insured had died through accidental means; that the paper filed with defendant is merely a proof of death. Plaintiff went with a friend to the office of the defendant company shortly after the death of the insured; defendant's agent questioned plaintiff about the death of his wife and plaintiff answered some eighteen or twenty questions put to him by the agent and the answers were put down by the agent in the usual form made out for claims, and the document was then signed and sworn to by the plaintiff. This paper contained the statement that the deceased had been asphyxiated and also that

the cause of death was asphyxiation; the answer to the question as to the duration of illness was, "Suddenly - coroner's case;" it also contained the statement that there were no physicians attending the deceased in her last illness. At the same time there was also left with the defendant the certificate of the coroner of Cook county containing the finding that, "The Cause of Death was as follows: Asphyxiation by illuminating gas poisoning inhaled gas which was escaping from open burner of gas range in her home. Contributory (secondary) Accidental. Injury received in Chicago, City." This was sufficient to notify the defendant that the cause of death was accidental. No request for any additional proof was made by the defendant and it must therefore be presumed that all the information it required was furnished. Upon the trial a physician who was employed by the County at the time of the death of the insured and who had examined her body, gave it as his opinion that "her death was the result of asphyxiation by carbon monoxide gas poisoning, or illuminating gas."

Defendant's brief complains of the refusal of the court to permit further examination of one of the witnesses. The brief does not sufficiently point out facts from which we may conclude whether the evidence sought to be developed was relevant, material, competent or important.

The evidence justified the finding of the court, and the judgment is therefore affirmed.

AFFIRMED.

Matchett and O'Connor, JJ., concur.

the cause of death was asphyxiation; the answer to the question as to the duration of illness was, "Sudden - unknown - cause"; it also contained the statement that there were no physical signs in the deceased in her last illness. At the same time there was also left with the defendant the certificate of the coroner of Cook county containing the finding that, "The cause of death was as follows: asphyxiation by illuminating gas poisoning induced gas which was seeping from open burner of gas stove in her home. Contributory (secondary) accidental. Injury received in Chicago, Ill." This was sufficient to notify the defendant that the cause of death was accidental. He requested for any additional proof was made by the defendant and it was therefore he presented that all the information is required was furnished. Upon the trial a physical was not required by the County of the time of the death of the deceased and who had examined her body, gave it as his opinion that "her death was the result of asphyxiation by carbon monoxide gas poisoning, or illuminating gas."

The defendant's legal counsel at the trial of the case in permit further examination of one of the witnesses. The trial court was satisfied with the evidence and found that the evidence sought to be developed was relevant, material, competent and admissible.

The evidence testified the finding of the court, and the defendant is therefore affirmed.

ATTESTED.

36451

LOUIS YAMLIN, Doing Business
as the CHICAGO FLOAT WORKS,
Appellee,

vs.

THE UNION PRODUCTS COMPANY, as
Ohio Corporation,
Appellant.

APPEAL FROM MUNICIPAL
COURT OF CHICAGO.

270 I.A. 617³

MR. PRESIDING JUSTICE McSURELY
DELIVERED THE OPINION OF THE COURT.

Defendant appeals from an order denying its motion to vacate a judgment for \$1000 entered against it by default when the cause was called for trial and it failed to appear.

The record shows that the summons was served July 6, 1932, upon Ralph E. Stoltz, manager of the defendant corporation in Chicago; July 12, 1932, judgment by default was entered against defendant; July 14th defendant was apprised of this judgment; July 28th it filed a special and limited appearance by its attorneys for the sole purpose of moving to quash the service of summons. Under Rule 12 of the Municipal court, if such a motion raises an issue of fact dehors the record, the court will hear evidence presented. Defendant introduced evidence tending to show that it was an Ohio corporation, not doing business in Illinois; that Ralph E. Stoltz, upon whom the summons had been served, was a salesman only and not amenable to service as representing the defendant corporation; the record shows that when Stoltz received the summons, instead of reporting this to his principal office he foolishly returned it by mail to the Municipal court; the motion to quash was continued from time to time and September 23, 1932, was denied. Defendant did not stand by this motion, but the same day an order was entered that its special appearance stand as a general appearance and leave was given defendant to file its motion, supported by

LEWIS YARLES, alias "Bugs",
as the Chicago "Boss" of
Chicago, Illinois.

10.

THE CHIEF CLERK OF THE COURT,
CHICAGO, ILLINOIS.

200 I.A. 612

RE: "BUGS" LEWIS YARLES
RECEIVED THE CHIEF CLERK OF THE COURT.

Defendant's arrest from an arrest made by the police in
Chicago, Illinois, July 12, 1933, was made by the police in
Chicago, Illinois, July 12, 1933, was made by the police in
Chicago, Illinois, July 12, 1933, was made by the police in

The record shows that the defendant was arrested July 12,

1933, upon arrest by the police, manager of the defendant's
in Chicago, July 12, 1933, defendant was arrested by the police in
Chicago, Illinois, July 12, 1933, was made by the police in
Chicago, Illinois, July 12, 1933, was made by the police in

with it filed a special and limited agreement by the defendant
for the sole purpose of making it appear that the record of the

order July 12 of the defendant's arrest, it was a matter of
fact of fact that the record, and could not be seen without pro-
ceeding. Defendant's arrest was made by the police in
Chicago, Illinois, July 12, 1933, was made by the police in

in this connection, not being present in Illinois; that Ralph E.
Baker, upon the defendant's arrest, was a witness only
and not amenable to service as representing the defendant's inter-
ests; the record shows that when Baker received the summons, in-
stead of testifying that he had principal office he testifies re-

ceived it by mail to the defendant's court; the record shows that
testimony from time to time and September 20, 1933, was made.
Defendant's arrest was made by the police in Chicago, Illinois, July 12, 1933,

was made by the police in Chicago, Illinois, July 12, 1933, was made by the police in
Chicago, Illinois, July 12, 1933, was made by the police in
Chicago, Illinois, July 12, 1933, was made by the police in

and that the defendant to the fact that, answered by

affidavit, to vacate the default and judgment of July 12th; upon hearing this motion was overruled and defendant appeals from this order.

The main argument of defendant's brief in this court is addressed to the ruling of the court denying its motion to quash the service of summons, but this point is not before us for the reason that when the special appearance was ordered to stand as a general appearance and defendant filed its petition to vacate the judgment, it waived any irregularity in the service of summons. In the recent case In re Voislowsky, etc., v. Engel, 264 Ill. App. 398, we said that where a party takes steps in a case which could be sustained only by the exercise of jurisdiction, the appearance is general although he may have filed a limited special appearance, citing many supporting cases. Therefore, the only point for this court to consider is the propriety of the ruling of the trial court denying defendant's motion to vacate the judgment.

The judgment was entered July 12th and the petition to vacate was filed September 23rd, which was some time after the thirty days after judgment had gone by. The trial court held that the motion was made too late. Defendant claims that its petition comes under paragraph 409, chapter 37, Illinois Statutes (Cahill) which provides that after thirty days have expired a judgment may be vacated upon filing a petition setting forth grounds which would be sufficient to cause the same to be vacated by a bill in equity.

Plaintiff's statement of claim asserted that he had purchased from defendant certain materials to be used in covering certain tanks of the plaintiff; that defendant had guaranteed that the tanks so covered with these materials would cause them to be acid-proof and water-proof; that the covering of these tanks with the materials furnished by defendant was undertaken to be done by defendant under the supervision of its agent or servant; that

...to receive the balance and judgment of July 1931; upon

The main argument of defendant's brief in this court is addressed to the ruling of the court denying its motion to quash the service of summons, but this point is not before us for the reason that when the special appearance was entered to stand as a general appearance and defendant filed its petition to vacate the judgment, it waived any irregularity in the service of summons. In the recent case in 20 California, 2d, 411, 308 P.2d 411, 412, we said that where a party files a motion to set aside a judgment entered by the court in violation of the rules, the appearance is general although he may have filed a limited special appearance, stating only supporting causes. Therefore, the only point for this court is whether in the absence of the filing of the special court having defendant's motion to vacate the judgment.

[illegible]

...the material was underlain to be done by ... with-proof and water-proof; that the covering of these tanks with ... tanks so covered with these materials would cause them to be ... certain tanks of the electricity; that defendant had purchased some ... tanks from defendant certain materials to be used in covering

defendant wholly failed so to cover said tanks but did so in an improper manner by reason whereof the tanks were damaged by the acid in said tanks by destroying the bolts and eating up the wood in said tanks, thus destroying them, to the damage of plaintiff is the sum of \$1000. The petition to vacate the judgment is a general denial of these averments and does not set forth any matters upon the merits entitling defendant to equitable relief.

The petition also sets forth that the hearings on its motion to quash the summons were continued from time to time and that said motion was not acted upon until September 23, 1937; that in the light of these circumstances it would be inequitable to permit the default judgment to stand. Defendant had the option to abide by its motion to quash the summons or to abandon this and enter a general appearance and move for the vacation of the judgment. If it chose the latter course it could not assert as equitable grounds any matters connected with its motion to quash. As we have said above, with the entry of the general appearance of the defendant and its filing the motion to vacate the judgment, the motion to quash the summons was abandoned.

Defendant also says that plaintiff's claim is for unliquidated damages and that upon default of defendant no damages were proven, and that this was a fraud upon the court. If this was error, which is not conceded, it was error in procedure reviewable by this court upon writ of error. The petition does not state any equitable grounds in this respect which should have moved the court to vacate the judgment. In Mann v. Brown, 263 Ill. 394, it was held that the matter of assessing damages after default is one of practice which may be governed by rules of the Municipal Court, and Rule 18 of the Municipal Court seems to warrant the practice followed in this case. Furthermore, the record shows that upon the hearing of the motion to vacate, plaintiff's attorney offered to submit the

amount of damages to the court, saying that defendant had already offered plaintiff \$300 but the plaintiff would abide by whatever amount the court might determine. Defendant's counsel did not accept this offer and no further evidence was considered by the trial court.

We see no reason to disagree with the holding of the court, and the ruling of the court on the motion to vacate is affirmed.

AFFIRMED.

Hatchett and O'Connor, JJ., concur.

36521

S. A. GLOVER,
Plaintiff in Error;

vs.

COSMOPOLITAN LIFE INSURANCE
COMPANY, a Corporation,
Defendant in Error.

3 /
X
ERROR TO MUNICIPAL COURT
OF CHICAGO.

270 I.A. 617⁵

MR. PRESIDING JUSTICE McSURNELY
DELIVERED THE OPINION OF THE COURT.

Plaintiff, in an action of the fourth class in the Municipal Court wherein he sought to recover \$600 from the defendant, suffered an adverse finding and judgment. He asks for a reversal.

Plaintiff's statement of claim alleged in substance that he had performed services as an actuary for the Sheridan Life Insurance Company for which there was a balance due and unpaid of \$600; that subsequently the Sheridan Life Insurance Company and the Cosmopolitan Life Insurance Company, the defendant here, were duly consolidated pursuant to the statute relating to the consolidation and reinsurance of insurance companies; that by reason thereof the Cosmopolitan Life Insurance Company assumed the obligations and liabilities of said Sheridan Life Insurance Company and thus became liable to pay plaintiff the unpaid balance due upon his account with the Sheridan Life Insurance Company.

The statement also averred that on May 20, 1931, the Sheridan Life Insurance company executed and delivered to plaintiff its note for \$600 to evidence its indebtedness to plaintiff; that by the consolidation defendant became liable to pay this note; that the note contained a power of attorney to confess judgment, and that thereafter, on November 25, 1931, judgment by confession was rendered in the Municipal court against the Sheridan Life Insurance company for the amount due upon said promissory note, together with

interest and costs, aggregating \$675.30; that by virtue of the consolidation defendant became liable on said judgment.

Upon trial by the court plaintiff offered to prove his services to the Sheridan Life Insurance company and the balance due therefor; defendant objected to this evidence on the ground that plaintiff's sole cause of action was upon the judgment against the Sheridan Life Insurance company, the argument apparently being that the claim for services and the note were merged in the judgment, leaving it as the sole cause of action. The court sustained this objection.

Plaintiff also offered the certificate of the Director of Trade and Commerce approving the contract of consolidation or reinsurance of the Sheridan company with the Cosmopolitan company, together with the contract of consolidation and reinsurance. Objections to these documents were made upon the ground, as above indicated, that all claims of plaintiff had become merged in the judgment, and that the proof offered had no bearing on any liability that might exist against the defendant. The objections were overruled.

A record of the judgment obtained by plaintiff against the Sheridan Life Insurance Company upon the judgment note was admitted in evidence. Plaintiff also offered to prove a certain contract between M. H. Burke and George W. Jones and Harrison Parker. Objection to this was sustained on the ground that it had nothing to do with any liability of the defendant. At the conclusion of plaintiff's evidence the court, on motion of the defendant, found against the plaintiff and judgment was entered accordingly.

Defendant in this court seeks to support the judgment on the ground that the claim of plaintiff for services and also upon the note are merged in the judgment, and that defendant cannot be sued upon the judgment, citing Franklin Life Ins. Co. v. Adams, 90 Ill. App. 658. In this case the facts are similar to those before us.

interest and costs, aggregating \$1875.00; and by virtue of the same
affidavit returned because liable on said judgment.

Upon trial by the court plaintiff offered to prove his ac-
cess to the American Life Insurance Company and the balance due
thereon; defendant objected to this evidence on the ground that
plaintiff's sole cause of action was upon the judgment against the
American Life Insurance Company, the amount allegedly being due
the claim for services and the note were merged in the judgment,
leaving it as the sole cause of action. The court sustained this
objection.

Plaintiff also offered the certificate of the Director of
Trade and Commerce approving the contract of consolidation on the
insurance of the American company with the consolidation company, to-
gether with the contract of consolidation and assignment, which
showed to these documents were made upon the ground, as above
indicated, that all debts of plaintiff had become merged in the
judgment, and that the great offer had no bearing on any liability
which might exist against the defendant. The objections were overruled.

A review of the judgment obtained by plaintiff against the
American Life Insurance Company upon the judgment note was admitted
in evidence. Plaintiff also offered to prove a certain contract
between E. J. Davis and George V. Davis and Arthur Davis, ex-
hibited to this was sustained on the ground that it had nothing to
do with any liability of the defendant. At the conclusion of plain-
tiff's evidence the court, on motion of the defendant, found against
the plaintiff and judgment was entered accordingly.

Defendant in this case seeks to support the judgment on the
ground that the claim of plaintiff for services and also upon the
note are merged in the judgment, and that defendant cannot be sued
upon the judgment, citing Smith v. Smith, 101
Cal. 425. It will be seen that the facts are entirely different in

It was there held that while the statute authorizing consolidations (now chap. 73, para. 39, Cahill) provided that suits pending at the time of the consolidation shall not be abated or discontinued by reason of such consolidation, but may be prosecuted to final judgment in the same manner as if consolidation had not taken place, yet where actions on claims had not been commenced before consolidation, and claimant had, after consolidation, commenced suit and obtained a judgment against a constituent company, it could not sue on the judgment against the consolidated company. The opinion on this point is not applicable here for the reason that, as we hold, neither the note nor judgment in the present case has any validity, and that plaintiff was entitled to proceed against the defendant only upon the first count of its statement of claim, namely, for the balance due at the date of consolidation for services rendered the Sheridan Life Insurance Company, for which, upon the consolidation, defendant became liable.

The contract of consolidation and reinsurance was executed May 18, 1931; the judgment note executed by the Sheridan Life Insurance company, by Harrison Parker, its president, was executed May 20, 1931, or two days after the execution of the contract of consolidation; by clause 5 of said contract the Sheridan Life Insurance company sold to the Cosmopolitan Life Insurance company all existing business, assets, etc., and this company agreed to "assume said liabilities" of the Sheridan Life Insurance company. By a consolidation under such circumstances the consolidated company becomes answerable and liable for all debts and obligations of the constituent companies. Para. 71, chap. 32, Cahill's Ill. Stats. 1931; C. S. F. & C. Ry. Co. v. Ashling, 160 Ill. 373; Chicago Title & Trust Co. v. Doyle, 259 Ill. 489; Southern Ill. Gas Co. v. Commerce Commission, 311 Ill. 299; Sikes v. Moline Consumers Co., 293 Ill. 112; Scheidel Coil Co. v. Rose, 242 Ill. 484; Chicago &

Joliet Elec. Ry. Co. v. Ferguson, 106 Ill. App. 356.

The statute further provides - chap. 73, para. 31, Cahill - that no articles of consolidation or reinsurance "shall take effect unless and until" the articles of consolidation have received the approval of the Director of Trade and Commerce. The approval of the contract of consolidation in question was given by the Director July 28, 1931, and plaintiff argues that as the consolidation did not become effective until this latter date the Sheridan Life Insurance Company had the power, in the interim between the execution of the contract of consolidation and the date of its approval by the Director, to execute the note. We cannot agree with this contention. Some authorities say that upon the execution of an agreement of consolidation the constituent companies are dissolved and a new company is created. 2 Cook on Stockholders, (3d ed.), sec. 910; 1 Beach on Private Corporations, sec. 338. But however this may be, it would be contrary to reason and justice to permit a constituent company, after the contract of consolidation is executed, to enter into new contracts and to incur new obligations. We hold, therefore, that the liabilities assumed by the consolidated company under the contract of consolidation were the liabilities existing at the date the contract was executed, which contract became effective as of that date upon receiving the approval of the Director of Trade and Commerce. It follows that the note executed two days after the contract of consolidation was executed was a nullity and of no force and effect.

As we have indicated, plaintiff was entitled to proceed against defendant to recover the balance claimed to be due when the contract was executed, for services rendered to the Sheridan Life Insurance company, and defendant was entitled to present such defense to this as the Sheridan Life Insurance company might have presented.

The testimony offered by plaintiff touching such services was competent as was also the evidence as to the consolidation. In the offer of the contract of July 8, 1931, purporting to be between Burke and Jones on the one hand, with Harrison Parker, counsel for plaintiff stated that these parties were acting on behalf of the Cosmopolitan Life Insurance company and the Sheridan Life Insurance company, respectively. If this could be shown, the document was admissible as it refers specifically to the indebtedness to plaintiff.

The case relied on by defendant, Franklin Life Ins. Co. v. Adams, supra, tends to support our conclusion, for it was there held that the plaintiff could proceed against the consolidated company upon the policy issued by one of the constituent companies.

For the reasons indicated the judgment is reversed and the cause is remanded for further proceedings consistent with what we have said in this opinion.

REVERSED AND REMANDED.

Matchett and O'Connor, JJ., concur.

The testimony given by Elizabeth regarding each witness was presented as was also the evidence as to the identification. In the trial of the indictment of July 2, 1911, testimony as to having seen and been on the same boat with William Barker, known for Elizabeth stated that these parties were sailing on behalf of the International Life Insurance Company and the Western Life Insurance Company, respectively. It is to be noted that the testimony was substantially as it relates especially to the indebtedness to Elizabeth.

The case relied on by defendant, Franklin v. The State, is a case in which it is stated that defendant, who is now living, told the witness that he was present at the time the company made the policy issued by one of the constituent companies. For the reasons indicated the judgment is reversed and the case is remanded for further proceedings consistent with what we have said in this opinion.

REVEREND AND HONORABLE

Justice and O'Connor, JJ., concur.

36504

HERTHA GERS, Appellee,

vs.

BENEFIT ASSOCIATION OF RAILWAY
EMPLOYEES, a Corporation,
Appellant.

APPEAL FROM SUPERIOR COURT
OF COOK COUNTY.

270 I.A. 617⁴

MR. PRESIDING JUSTICE McSURELY
DELIVERED THE OPINION OF THE COURT.

Plaintiff, bringing suit upon an accident policy for \$2500 issued by defendant, in which she was named as beneficiary, upon trial had a verdict of a jury for \$1306.67, and defendant appeals from the judgment for this amount.

The insured, Herbert Gers, was the son of plaintiff and the policy covered death by accident. He was accidentally killed February 9, 1930, while the policy was in effect; proofs of death were duly made and filed with defendant pursuant to the provisions of the policy.

Defendant issued two accident policies to Herbert Gers, one dated October 16, 1924, for \$1000 and the other, upon which this suit is brought, dated August 2, 1925, for \$2500; plaintiff was named as beneficiary in both policies.

The defense presented is that plaintiff by an instrument in writing released all her claims against defendant on any insurance policies. Plaintiff replies that the release was only of her claim under the \$1000 policy, and that if the document purports to release any claims under the \$2500 policy her consent and signature thereto were obtained by fraud.

The jury could properly believe that on or about March 7, 1930, plaintiff was requested to come to the office of defendant to interview Mr. Donovan, a representative of defendant, and was requested to bring the policy with her; the following day she called

RECEIVED AT THE OFFICE OF THE ATTORNEY GENERAL
WASHINGTON, D. C.
JANUARY 10, 1930

ATTEST
JANUARY 10, 1930

EXHIBIT A

RECEIVED AT THE OFFICE OF THE ATTORNEY GENERAL
WASHINGTON, D. C.
JANUARY 10, 1930

Plaintiff, appearing with and as co-defendant herein for and in answer to the complaint, in which she was named as defendant, upon trial had a verdict of a jury for \$1000.00, and defendant appeals from the judgment for this amount.

The insured, Herbert Gray, was son of plaintiff and the policy covered him by accident. He was accidentally killed February 7, 1920, while the policy was in effect; proceeds of said policy were paid and filed with defendant pursuant to the provisions of the policy.

Defendant issued two accident policies to Herbert Gray, one dated October 15, 1919, for \$1000 and the other, upon which this suit is brought, dated August 2, 1920, for \$1000; plaintiff was named as beneficiary in both policies.

The defense presented is that plaintiff by an instrument in writing released all her claims against defendant on any account or policy. Plaintiff testifies that the release was only of her claim under the 1920 policy, and that it was obtained by fraud. In evidence was shown that the 1920 policy was issued and signed by defendant's agent, and that the 1919 policy was obtained by fraud.

The jury could properly believe that on or about March 7, 1920, plaintiff was requested to come to the office of defendant, in testimony of defendant, a representative of defendant, and was requested to sign the policy with him; the defendant says the policy

on Mr. Donovan and took with her the \$1000 policy. Upon the trial she was asked whether at that time she knew of the existence of a policy ^{for} \$2500 issued to her son, to which she replied, "No, I did not." The attorney for defendant objected to this as immaterial, which objection was sustained. This testimony was competent, and the objection should have been overruled. Mr. Donovan asked her if she had the policy, to which she replied in the affirmative and handed the \$1000 policy to him; after examining it he told her that the company was not liable thereon as there was some question surrounding the death of her son; she inquired as to the reason defendant could not pay the amount of the policy and Mr. Donovan read some newspaper clippings concerning her son's death; he kept on reading them until, plaintiff says, she "broke down;" he then said to her, "I will offer you half the policy - \$500;" plaintiff declined to accept this; Mr. Donovan left the room but returned in about fifteen minutes and offered her \$900, saying that if she did not accept this she would have to wait two years and then maybe would not get anything; she finally said, in effect, that she did not want any litigation over \$100 and would agree to take \$900 as she needed the money, "rather than wait two years for the \$1000;" Mr. Donovan then gave her a check for \$900, together with a paper which she was asked to sign; plaintiff told him she could not read the paper as she did not have her spectacles with her and her eyes were sore from crying; that Mr. Donovan said, "There is nothing to it except concerning your boy's death and we have to put it on file;" the paper was not read or explained to her, except as stated; she accepted the check and signed the paper and delivered up the \$1000 policy to Mr. Donovan; nothing was said about any \$2500 policy.

It has been repeatedly held that a release even under seal is not a defense in an action at law if its execution is procured

on Mr. Donovan and took with her the \$1000 policy. Upon the trial she was asked whether at that time she knew of the existence of a policy issued to her son, to which she replied, "No, I did not." The attorney for defendant objected to this as immaterial, which objection was sustained. This testimony was competent, and the objection would have been overruled. Mr. Donovan asked her if she had the policy, to which she replied in the affirmative and handed the \$1000 policy to him; after examining it he told her that the company was not liable because an illness was some question concerning the death of her son; she insisted on it the reason being that she could not pay the amount of the policy and Mr. Donovan told some nonsense claiming concerning her son's death; he said as really that would, "I don't know," he said, "I will after you have the policy - \$1000." Plaintiff testified to seeing this; Mr. Donovan left the room and returned in about fifteen minutes and stated that \$1000, saying that if she did not accept this she would have to wait two years and then maybe would not get anything; she finally said, in effect, that she did not want any litigation over \$1000 and would agree to take \$1000 if she needed the money. "Better than wait two years for the \$1000," Mr. Donovan then gave her a check for \$1000, together with a paper which she was asked to sign; plaintiff testified that she would not read the paper as she did not know the signature and she did not sign with her two fingers; that Mr. Donovan said, "There is nothing at it except concerning your dog's death and we have to put it on this;" the paper was not read or explained to her, except as stated; she handed the check and signed the paper and delivered up the \$1000 policy to Mr. Donovan; plaintiff was told about the \$1000 policy. It was then repeatedly held that a release was made under seal to her a release in an action at law if the question is presented

by fraud or circumvention. Ill. Cent. N. W. Co. v. Welch, 52 Ill. 183; Parks v. Hammond Co., 192 Ill. 631; I. D. & W. Ry. Co. v. Fowler, 201 Ill. 152; Chicago City Ry. Co. v. McClain, 211 Ill. 589. A party should not be permitted to perpetrate a fraud and reap the benefits. Leonard v. Springer, 197 Ill. 532.

On referring to the abstract we do not find the release, but we are referred to the record. It has been repeatedly said that we need not go to the record in order to find reasons for reversal. Morris v. Kraici, 347 Ill. 381.

However, on examining the form of release in the record we find no reference therein to the policy for \$1000, which was the subject matter of the transaction between Mr. Donovan and plaintiff. The paper purports to release all claims on an insurance policy, No. 417846, which is the number of the policy for \$2500. Even if plaintiff had read the paper it would have told her nothing of the \$2500 policy, of whose existence she was ignorant, as she could not be expected to note the numbers on the policies; she would reasonably assume that she was releasing her claim on the \$1000 policy. Defendant's agent knew of the \$2500 policy and it is evident that the insertion of its number in the release instead of the number of the \$1000 policy was a fraud upon plaintiff.

Defendant says that there can be no recovery in this case unless plaintiff tenders back the \$900 paid her. The general rule is, that where a release has been obtained by fraud no return of the money paid is necessary in order to enable the defrauded one to recover the proper amount. The case cited by defendant is to this effect. Litchfield & Madison Ry. Co. v. Shuler, 134 Ill. App. 615. See also Pawnee Coal Co. v. Royce, 134 Ill. 402; O. R. I. & N. Ry. Co. v. Lewis, 109 Ill. 120; Worthley v. S. C. C. & St. L. Ry. Co., 251 Ill. App. 535. However, defendant cannot complain,

for the jury was instructed by the court, in substance, that if they should assess plaintiff's damages at \$2500 they should deduct the sum of \$900, which apparently was done. Plaintiff might complain, for this \$900 was given in settlement of the \$1000 policy and has no connection with the \$2500 policy, the subject matter of this suit. However, plaintiff assigns no cross-errors.

There were no reversible errors in the instructions, and as the only proper verdict was returned the judgment is affirmed.

AFFIRMED.

Matchett and O'Connor, JJ., concur.

In the Matter of the Petition of
STANLEY BAFIA, Insolvent Debtor,
Appellant,

vs.

WILLIAM C. LANGE, Administrator of
the Estate of John Lange, Deceased,
Appellee.

APPEAL FROM COUNTY COURT
OF COOK COUNTY.

270 I.A. 618¹

MR. JUSTICE MATCHETT DELIVERED THE OPINION OF THE COURT.

Bafia, judgment debtor, having been arrested on a causas ad satisfaciendum issued upon the petition of the judgment creditor pursuant to the provisions of section 62 of chapter 77 of the statutes (Smith-Hurd's Ill. Rev. Stats., chap. 77, sec. 62, p.1774), filed a petition praying that he might be released under the provisions of the Insolvent Debtors act (Smith-Hurd's Ill. Rev. Stats., chap. 72, pp. 1634-5).

The issues were submitted to a jury, motions of petitioner for a peremptory instruction in his favor having been denied. The jury returned a verdict finding petitioner guilty of having fraudulently conveyed, concealed or otherwise disposed of some part of his estate with a design to secure the same to his own use or to defraud his creditors. The jury also returned a verdict that petitioner was not guilty of unjustly refusing to surrender his estate not exempt. The court having overruled petitioner's motions for a new trial and in arrest, entered judgment remanding petitioner to the custody of the sheriff of Cook county, and this appeal is from that judgment.

It is asserted in behalf of petitioner that the causas issued without compliance with the provisions of section 62 of chapter 77; that the verdict is not supported by the evidence; that the court erred in instructing the jury; that the finding of guilty is contrary to the law, and that the motion of petitioner for a new trial should have been granted.

In the Matter of the Petition of
STANLEY KATIE, Insolvent Debtor,
Applicant.

APPEAL FROM COUNTY COURT

IN BANKRUPTCY.

WILLIAM C. LANE, Administrator of
the Estate of John Lane, Deceased,
Appellee.

3701A.618

MR. JUSTICE MATHESON DELIVERED THE OPINION OF THE COURT.

Justice, judgment, having been arrested on a writ of habeas corpus, judgment was given upon the petition of the bankrupt creditor.

Reference to the provisions of section 68 of chapter 77 of the Statutes (which reads: "any creditor, who, by the provisions of section 68 of chapter 77, sec. 68, p. 1774), filed a petition praying that he might be released under the provisions of the Insolvent Debtors Act (which reads: "any creditor, who, by the provisions of section 68 of chapter 77, sec. 68, p. 1774),

The issues were submitted to a jury, motions of petitioner for a peremptory instruction in his favor having been denied. The jury returned a verdict finding petitioner guilty of having fraudulently conveyed, concealed or otherwise disposed of some part of his estate with a design to secure the same to his own use or to the benefit of his creditors. The jury also returned a verdict that petitioner was not guilty of unjustly refusing to surrender his estate to the court having awarded petitioner's motions for a new trial and in arrest, entered judgment remanding petitioner to the custody of the sheriff of Cook county, and this appeal is from that judgment.

It is asserted in behalf of petitioner that the writ of habeas corpus is not supported by the evidence; that the court erred in instructing the jury; that the finding of guilty is contrary to the law, and that the action of petitioner for a new trial should have been granted.

Section 62 of chapter 77 provides in substance that if after the return of an execution unsatisfied, the judgment creditor shall make an affidavit stating that demand has been made upon the debtor for the surrender of his estate for the satisfaction of such execution, and that he believes the debtor has estate not exempt from execution, which he unjustly refuses to surrender, or that after the debt was contracted or the cause of action accrued, the debtor has fraudulently conveyed, concealed or otherwise disposed of some part of his estate with the design to secure the same to his own use or defraud his creditors; that if it appears that the facts tending to show his belief is well founded a judge of the court may authorize the issuing of an execution against the body of the debtor, and that upon the filing of such affidavit and order with the clerk, such execution shall issue.

Petitioner contends that no such demand was made upon him under this section of the statute and cites Maher v. Huette, 10 Ill. App. 36. That case, however, is clearly distinguishable. The only question under consideration there was whether the return of the officer which showed only that the execution was read to defendant and that he was asked to pay it, was equivalent to a demand that the debtor surrender his property to be levied upon, and it was held that it was not. In this case the return of the sheriff shows the service of a copy of the execution on January 22, 1932, by leaving the same for the petitioner with him at his usual place of abode, at the same time informing him of the contents thereof and demanding money or property to satisfy the writ. The return also states that the copy of the execution delivered had an endorsement thereon notifying petitioner that he must file a schedule of his property within ten days in order to claim his exemption. The return further states as follows:

Section 22 of Chapter 77 provides in substance that if
after the return of an execution is satisfied, the judgment creditor
for small sums an affidavit stating that he has been made upon
the debtor for the payment of his estate for the satisfaction
of such execution, and that he believes the debtor has estate not
except from execution, which he unjustly refused to surrender, or
that after the debt was contracted or the cause of action accrued,
the debtor has fraudulently conveyed, transferred or dissipated his
property of some part of his estate with the design to prevent the
same to his own use or between his creditors; that it is apparent
that the facts pending to show his belief is well founded a judge
of the court may authorize and issue an order of execution against the
body of the debtor, and that upon the filing of such affidavit and
order with the clerk, such execution shall issue.
Petitioner contends that no such demand was made upon him
under this section of the statute and cites Wright v. Wright, 10
Ill. App. 38. That case, however, is clearly distinguishable.
The only question under consideration there was whether the return
of the officer which showed only that the execution was paid to
debtor and that he was asked to pay it, was equivalent to a de-
mand that the debtor surrender his property to be levied upon, and
it was held that it was not. In this case the return of the
officer shows the service of a copy of the execution on January
22, 1932, by leaving the same for the petitioner with him at his
usual place of abode, at the same time informing him of the con-
tent thereof and demanding money or property to satisfy the writ.
The return also states that the copy of the execution delivered
and an acknowledgment of receipt of the execution was made by the
debtor of his property within ten days in order to claim his
exemption. The return further states as follows:

"I did on the 10th day of March, 1938, demand of the within named defendant, Stanley Bafia, that he pay this execution, or that he surrender sufficient of his estate, goods, chattels, lands and tenements for the satisfaction of this writ, and I also informed said Stanley Bafia that if he failed to comply with said demand he would be liable to arrest upon an execution against his body, and also at the time of making said demand, I delivered to the within named defendant Stanley Bafia, a copy of this writ with an endorsement thereon bearing my signature, notifying him that he must file a schedule of his property within ten days from the date of said demand, in order to claim his exemption, and failed to satisfy this writ, or any part thereof."

We hold this demand to be sufficient under the statute.

It is argued that petitioner when called as a witness by respondent denied that such demand had been made upon him, but his testimony is not corroborated in any way, and the law is that the return of the sheriff cannot be contradicted by the unsupported testimony of the party served. Leitch v. Colson, 8 Ill. App. 453; Boksa v. Buchanan, 245 Ill. App. 602; Smith v. Zuta, 247 Ill. App. 203; Moore v. Robbins Machinery & Supply Co., 252 Ill. App. 24. If the return of the sheriff is false or fraudulent, the remedy of a defendant is by an action against him either at law or in equity. Howen v. Parkhurst, 24 Ill. 256; Hunter v. Stoneburner, 92 Ill. 75; Marabia v. Thompson Hospital, 309 Ill. 147; Marnik v. Cusack, 317 Ill. 362.

Moreover, section 62 of the statute provides in substance that the saunas may issue under either of two circumstances: (1) if the debtor has property not exempt from execution which he unjustly refuses to surrender; and (2) where the debtor has since the debt was contracted or the cause of action accrued, fraudulently conveyed, concealed, or otherwise disposed of some part of his estate, with a design to secure the same to his own use, or defraud his creditors. In the first class of cases, as we interpret the statute, it is a condition precedent that a demand be made, and in the second class of cases no demand is necessary. According to the verdict of the jury, the conduct of the petitioner belongs to the second class denounced by the statute. We therefore hold, first,

"I did on the 10th day of March, 1877, demand of the witness named Attorney General, that he pay this execution of the Government of his estate, and I also informed him that if he failed to comply with this demand he would be liable to arrest upon an execution against his body, and also of the time of making said demand, I delivered to the witness named Attorney General, a copy of this writ with an endorsement thereon bearing my signature, notifying him that he must like a schedule of his property within ten days from the date of said demand, in order to claim his exemption, and failed to comply with this demand."

We held this demand to be sufficient under the statute. It is argued that petitioner when called as a witness by respondents failed that such demand had been made upon him, and his testimony is not corroborated in any way, and the law is that the return of the sheriff cannot be contradicted by the uncorroborated testimony of the party called. People v. Wilson, 4 Ill. App. 450; People v. Wilson, 218 Ill. App. 502; People v. Wilson, 218 Ill. App. 502; People v. Wilson, 218 Ill. App. 502. It was argued on the other side in favor of respondents, the remedy of a writ of habeas corpus is by an action against him either at law or in equity. People v. Wilson, 218 Ill. App. 502; People v. Wilson, 218 Ill. App. 502; People v. Wilson, 218 Ill. App. 502.

111. 222. However, section 22 of the statute provides in substance that the party may take either of two courses: (1) If the debtor has property not exempt from execution which he may lawfully retain he may retain it; and (2) where the debtor has no such property, he may be sold, or otherwise disposed of, as a part of his estate, with a design to secure the same to his own use, or to the use of his estate. In the first class of cases, as we interpreted the statute, it is a condition precedent that a demand be made, and in the second class of cases no demand is necessary. According to the verdict of the jury, the conduct of the petitioner belongs to the second class announced by the statute. We therefore hold, that

that the demand was sufficient, if necessary, but, second, that under the facts here disclosed the demand was not at all necessary.

The petitioner also contends that the affidavit of respondent, under which the casias issued, was insufficient and cites Thornigan v. Davenport, 1 Scam. 396, and Huntington v. Metzger, 51 Ill. App. 222. The last named case, however, was reversed by the Supreme court, 153 Ill. 272. Moreover, as petitioner failed to raise that question in the trial court by motion to quash, he can not raise it for the first time in this court. Danner v. American Ins. Co., 110 Ill. App. 580; Glas v. Spitzer, 226 Ill. 32; Birney v. Solomon, 348 Ill. 410. We hold the affidavit was sufficient.

It is next contended in behalf of petitioner that under the evidence the court should have directed a verdict in his favor and that, at any rate, in view of the evidence it appears that the jury must have been swayed in returning the verdict by some element other than by the evidence before them. It is pointed out that petitioner was called as a witness by respondent, and it is contended that having called petitioner as his witness, respondent was bound by his testimony. In view of the conclusion to which we have come, we shall not undertake to discuss the weight of this testimony further than to say that the rule upon which petitioner relies originated at a time when under the law the parties to an action were incompetent witnesses in their own behalf, and like other rules it has exceptions. One of these is that a party who calls the other as his witness is bound only so far as his testimony is entitled to credence, taking into consideration its reasonableness and all other tests of credibility. The rule is one that is often misunderstood. Rockwood v. Poundstone, 38 Ill. 199; Mitchell v. Sawyer, 115 Ill. 650; Lasher v. Colton, 225 Ill. 234; Continental Portland Cement Co. v. Koch, 211 Ill. App. 93.

The evidence in this case shows that Lange as administrator sued Rafia in the Superior court of Cook county; that on December 10,

1931, the jury returned a verdict in favor of the administrator for the amount of \$5,000, and that December 28, 1931, the court overruled the motion of defendant for a new trial and entered judgment upon which this proceeding is based. The business of petitioner was that of an undertaker, and the 15th of December, 1931, which was five days after the return of the verdict and thirteen days before the entry of the judgment, seems to have been a day of considerable activity on his part. On that day he executed a chattel mortgage conveying personal property to the Standard Casket Co. for a consideration, as alleged, of \$1890. On the same day he executed a chattel mortgage on other personal property to Frank Krzyslak to secure an alleged indebtedness of \$1274. On the same day he executed another chattel mortgage to the American Casket Co. to secure an alleged indebtedness of \$445. These conveyances seem to have covered most of his personal property. On the same day the debtor and his wife executed a trust deed to secure an alleged indebtedness in the sum of \$5500 whereby they conveyed their real estate to Frank Stach, trustee. The first mentioned mortgage would become due June 15, 1933, the second October 1, 1933, the third January 2, 1933, and that secured by the trust deed would mature by its terms three years after date. These papers seem to have been prepared by the attorney for the debtor and recorded by the debtor himself. The trustee recited that the debtor called him up and requested him to act. As already stated, we shall not undertake to review the evidence, for the issue in the case was for the jury.

It was necessary, however, that in returning their verdict the jury should be properly instructed as to the law applicable. At the request of the respondent the court gave to the jury the following instruction:

"The court instructs the jury that a debtor may prefer one creditor from another, but if you believe from the evidence in this

1931, the jury returned a verdict in favor of the defendant for the amount of \$5,000, and that December 28, 1931, the court overruled the motion of defendant for a new trial and entered judgment with said this proceeds in favor of the plaintiff. Defendant was not at the hearing, and the jury at December 1931, which was five days after the return of the verdict was fifteen days before the entry of the judgment, some of the time was a day of considerable activity on his part. He had not been executed a chattel mortgage covering personal property to the Standard Bank Co. for a consideration, as alleged, of \$1,000. On the same day he executed a chattel mortgage on other personal property to Frank Kuylen to secure an alleged indebtedness of \$1,000. On the same day he executed another chattel mortgage to the Standard Bank Co. to secure an alleged indebtedness of \$1,000. These mortgages seem to have covered most of his personal property. On the same day the debtor and his wife executed a trust deed to secure an alleged indebtedness in the sum of \$5,000 whereby they conveyed their real estate to Frank Kuylen, trustee. The first mentioned mortgage would become due June 18, 1932, the second October 1, 1931, the third January 1, 1932, and that secured by the trust deed would mature by its terms three years after date. These papers seem to have been prepared by the attorney for the debtor and recorded by the debtor himself. The trustee testified that the debtor called him up and requested him to act. He already stated, we shall not undertake to review the evidence, for the issue in the case was for the jury.

If was necessary, however, that in returning their verdict the jury should be properly instructed as to the law applicable. At the request of the respondent the court gave to the jury the following instruction:

"The court instructs the jury that a debtor may direct and execute from another, but is not authorized to execute in favor of another a mortgage covering personal property to the Standard Bank Co. for a consideration, as alleged, of \$1,000. On the same day he executed a chattel mortgage on other personal property to Frank Kuylen to secure an alleged indebtedness of \$1,000. On the same day he executed another chattel mortgage to the Standard Bank Co. to secure an alleged indebtedness of \$1,000. These mortgages seem to have covered most of his personal property. On the same day the debtor and his wife executed a trust deed to secure an alleged indebtedness in the sum of \$5,000 whereby they conveyed their real estate to Frank Kuylen, trustee. The first mentioned mortgage would become due June 18, 1932, the second October 1, 1931, the third January 1, 1932, and that secured by the trust deed would mature by its terms three years after date. These papers seem to have been prepared by the attorney for the debtor and recorded by the debtor himself. The trustee testified that the debtor called him up and requested him to act. He already stated, we shall not undertake to review the evidence, for the issue in the case was for the jury."

case that such preference, if any, was made for the purpose of hindering and delaying other creditors, then such preference, if any, would be fraudulent."

By another instruction given at the request of respondent the jury was told:

"** if you believe from the evidence that the mortgages executed by the petitioner, Stanley Bafia, to certain of his creditors, were executed to secure a bona fide debt, yet, if you further believe that said mortgages were executed for the purpose of hindering and delaying other creditors of said Stanley Bafia, then you should find the petitioner guilty."

It is urged that both these instructions are erroneous upon the authority of Nelson & Company v. Leiter, 190 Ill. 414, and State Bank of Mansfield v. Moore State Bank, 249 Ill. App. 237,

It is urged that these instructions in effect told the jury that petitioner might be found guilty if the preference given would have the effect or was intended to hinder and delay his creditors, and that such statement of the law is incorrect and misleading.

It is not true that every conveyance which has the effect of hindering and delaying creditors or which results in giving other creditors a preference, is fraudulent. In the quite recent case of Hurt v. Ohlson, 349 Ill. 163, the Supreme court said:

"It is well established by the decisions of this court that a debtor may prefer one creditor over others when he acts without fraud, even though he transfers all of his property to the preferred creditor. (Third Nat. Bank v. Morris, 331 Ill. 230; Schroeder v. Walsh, 130 id. 403;) *** Circumstances shown by the evidence from which a conclusion that the transaction was fraudulent might be drawn may be overcome by evidence establishing the good faith of the transaction. Zwick v. Catavenis, 331 Ill. 240."

As was said in Nelson & Co. v. Leiter, 190 Ill. 414:

"The test to be applied is whether the debtor, in exercising the privilege of making the preference, acts in good faith, with the intent to pay, or secure the payment of, a just indebtedness against him, and he cannot be deprived of the right on the ground he knows or intends that the preference given to one creditor, to the extent such preference shall be available and effective, will operate to hinder and delay other creditors."

The first instruction complained of was erroneous in that it announced to the jury that if a preference was made for the purpose of hindering and delaying other creditors, such preference

would be fraudulent; and the second instruction complained of was erroneous in that although the mortgages were executed to secure a bona fide debt, yet petitioner was guilty if they were executed for the purpose of hindering and delaying his other creditors. That is not the correct rule. Every debtor in failing circumstances who gives to one creditor a conveyance of his property by way of security or satisfaction, must know and must therefore intend, that it will hinder and delay the creditors who are not preferred. The real test which should be applied is whether in making that preference the debtor acts in good faith with the intent to pay or secure the payment of a just indebtedness against him. He has a right to give preference to one creditor over another, and he has a right legally to intend the inevitable result that his other debtors may not get anything at all but he must not act in bad faith. He must not make and execute a security which he has not intended actually to be a security at all. He has no right to create an instrument indicating his intention to pay when it is the intention of the parties to it that it shall not amount to payment. When a debtor does in good faith convey with the intention and purpose to pay or secure his creditor, the transaction is not assailable upon the ground that it is fraudulent, although the effect of it must be to postpone and hinder the collection of claims of other creditors. These instructions were wrong and should not have been given.

For the error in that regard the order is reversed and the cause remanded for another trial.

REVERSED AND REMANDED.

McSurely, P. J., and O'Connor, J., concur.

would be fraudulent; and the second instruction complained of was
erroneous in that although the mortgages were executed to secure a
loan, the fact that the mortgages were executed to secure a
loan does not, in itself, make the mortgages fraudulent. That
for the purpose of obtaining and delaying his other creditors. That
in not the correct time. Every factor in telling circumstances who
gives to and receives a mortgage at his property by way of secur-
ity to the mortgagee, must have been a mortgagee. That is
will hinder and delay the creditors who are not protected. The fact
that which should be applied in making that protection
the factor who is not paid will be liable to pay at once the
payment of a just indebtedness against him. He has a right to give
preference to one creditor over another, and he has a right legally
to make the mortgagee's assets that his other creditors may not get
satisfied at all but he must not be paid later. He must not make
and receive a mortgage when he has not received anything to be a
security at all. He has no right to create an instrument indicating
his intention to pay when it is the intention of the parties to it
that it shall not amount to payment. When a factor does in good faith
convey with the intention and purpose to pay or secure his creditor,
the transaction is not fraudulent when the fact that it is trans-
acted, although the effect of it may be to postpone and hinder the
collection of claims of other creditors. These instructions were
wrong and should not have been given.
For the error in last regard the order is reversed and the
case remanded for another trial.

REVEREND AND HONORABLE

Respectfully, J. L. and A. C. 11, 1887.

36309

DENA BRADLEY,
Appellee,

vs.

MRS. K. LANGDON,
Appellant.

33
APPEAL FROM CIRCUIT COURT
OF COOK COUNTY.

A
270 I.A. 618²

MR. JUSTICE MATCHETT DELIVERED THE OPINION OF THE COURT.

This is an appeal by defendant from a judgment in the sum of \$1000 entered upon the verdict of the jury, after motions for a new trial and in arrest had been overruled, in an action on the case for personal injuries.

The declaration was in two counts which in substance averred that the plaintiff, while riding in an automobile on September 6, 1931, in a westerly direction on the north side of East Forty-sixth street, Chicago, was injured as a result of a collision with an automobile driven by defendant in a northerly direction on South Michigan avenue. Each of the counts averred that the negligence of defendant was malicious, wilful, wrongful and unlawful, and damages were claimed in the sum of \$20,000. Defendant filed a plea of the general issue.

Defendant contends that the judgment should be reversed because there was no evidence tending to support the charge that the negligence was wilful, wanton and malicious, and because the weight of the evidence was in favor of defendant; that the court erred in its rulings upon the evidence offered; that the statements and remarks made by the court during the trial were improper and prejudicial to defendant, and that there were serious errors in the giving and refusing of instructions.

As to the contention of defendant that there is no proof in the record tending to sustain the charge that the negligence averred was wilful, wanton and malicious, we agree that the evidence wholly fails to disclose any negligence which might properly

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870 I.A. 618

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This is an appeal by defendant from a judgment in the sum of \$100,000 entered upon the verdict of the jury, after motions for a new trial and in arrest had been overruled, in an action on the part of the plaintiff.

The location was in two counts when in substance overruled that the plaintiff, while riding in an automobile on Highway 1, in a westerly direction on the north side of the highway, was injured by defendant in a collision with an automobile driven by defendant in a westerly direction on said Highway. Each of the counts averred that the negligence of defendant was willful, wantonly, malicious and reckless, and damages were claimed in the sum of \$20,000.

Defendant filed a plea of the general issue. Defendant contends that the judgment should be reversed because there was no evidence tending to support the charge that the negligence was willful, wantonly and malicious, and because the weight of the evidence was in favor of defendant; that the court erred in its ruling upon the evidence offered; that the state made no timely motion by the court during the trial when improper and prejudicial to defendant, and that there were serious errors in the giving and receiving of instructions.

As to the contention of defendant that there is no proof in the record tending to sustain the charge that the negligence was willful, wantonly and malicious, we agree that the evidence tends to show that the negligence was willful, wantonly and malicious, and that there were serious errors in the giving and receiving of instructions.

be designated as wilful, wanton or malicious. There was submitted to the jury, however, what the record designates as a special interrogatory but what in reality was a written instruction by which the court told the jury that before defendant could be found guilty of wanton and wilful conduct, the jury must find by a preponderance or greater weight of the evidence (1) that the alleged act of defendant in injuring plaintiff was intentional on the part of defendant, or (2) that the alleged act of defendant in injuring plaintiff was committed under such circumstances as exhibited a reckless disregard for the safety of others, such as a failure, after knowledge of the impending danger, to exercise ordinary care to prevent it, or a failure to discover the danger through recklessness or carelessness when it could have been discovered by the exercise of ordinary care; that if they were unable to find from a preponderance or greater weight of the evidence that either one or both of the elements above set forth were present in connection with the alleged acts of negligence on behalf of defendant, then they should find defendant not guilty of wanton and wilful conduct. The court gave this so-called interrogatory to the jury and orally gave the following direction in respect thereto:

"If you believe that she was guilty of wilful and wanton conduct, then each of you will sign under the heading, 'Yes'; if you believe that she was not guilty of such conduct, then each of you will sign under the heading 'No.'"

In response to this direction the jury answered yes.

While there was a motion for a new trial by defendant, the record fails to disclose any motion to set aside the so-called answer to the so-called interrogatory; and plaintiff now contends that defendant having requested the court to submit this special interrogatory to the jury cannot question the propriety of its submission, and that as the record fails to disclose a motion by defendant to set aside the special finding of the jury, defendant

be designated as witness, witness or defendant. There was submitted

to the jury, however, when the record designated as a special in-

vestigator and what in reality was a written investigation by

which the court said the jury that before defendant could be

found guilty of murder and willful conduct, the jury must find by a

preponderance of greater weight of the evidence (1) that the al-

leges not of defendant in inflicting plaintiff was intentional or

the fact of defendant, or (2) that the witness not of defendant

in inflicting plaintiff was negligent under such circumstances as

required a criminal intent for the acts of defendant, such as

a finding, after investigation of the foregoing facts, he was guilty

of murder, or of willful conduct, or of willful conduct and

through defendant as defendant, or of willful conduct and

defendant in the conduct of defendant, and that in each case

there is a finding of defendant of willful conduct of the

evidence that either one or both of the elements above set forth

will be found in defendant and the alleged acts of defendant in

conduct of defendant, and that defendant not guilty of

murder and willful conduct. The court gave this no-called in-

vestigation to the jury and orally gave the following direction

to the jury:

"If you believe that the defendant is guilty of willful conduct
and that the defendant is guilty of willful conduct, then each of
you will find under the heading 'No.'"

In response to this direction the jury answered:

"We find the defendant guilty of willful conduct, and

thereby fails to disclose any action to set aside the no-called

answer to the no-called investigation; and plaintiff now answers

that defendant failed to disclose the truth in regard to this special

investigation to the jury under the heading of the

investigation, and that as the record fails to disclose a motion

or defendant to set aside the special finding of the jury defendant

is conclusively bound by it. Plaintiff cites Brimie v. Belden Mfg. Co., 287 Ill. 11; Brant v. Chicago & Alton R. R. Co., 294 Ill. 606, and other cases which in substance hold that a motion for a new trial is not equivalent to a motion to set aside a special finding of the jury, and that in the absence of such motion the party submitting the interrogatory is bound by the answer to it. The record shows that the interrogatory was tendered by defendant, but the record does not show that the oral instruction by the court with reference thereto was at defendant's request, and the instruction was given its interrogatory form by the court upon his own motion. However, defendant made no objection thereto, and, we hold, is not now in a position to assign error thereon. However, as a matter of fact, the instructions to the jury given by the court at the request of both parties show that the case was tried upon the theory that it was an ordinary case of negligence, in that both sets of instructions treated the question of contributory negligence as applicable to the facts of the case and without distinguishing, as a matter of law, between an action for wilful, wanton and malicious negligence and one in which the negligence was not wilful, wanton and malicious. Having submitted the case upon that theory, it will be reviewed by this court from that standpoint.

Irrespective of other errors assigned upon the record, we hold the contention of defendant that the verdict is against the manifest weight of the evidence is controlling.

The accident through which plaintiff was injured occurred Sunday, September 6, 1931, at about five o'clock p. m. Plaintiff, who lived at 5039 Forrestville avenue, was at that time riding with her relatives, Mr. and Mrs. James Nunley, who resided at 4955 Calumet avenue. Mr. and Mrs. Nunley called for plaintiff; they were driving a Chrysler car, which she entered and Mr. Nunley then drove from Forrestville avenue to 46th street, a public highway

is a summary of the evidence in this case.

Mr. J. H. Smith, Jr., who was the driver of the car, testified that he was driving on the highway at the time of the accident.

Mr. J. H. Smith, Jr., who was the driver of the car, testified that he was driving on the highway at the time of the accident. He testified that he was driving at a speed of about 40 miles per hour at the time of the accident. He testified that he was driving on the highway at the time of the accident. He testified that he was driving at a speed of about 40 miles per hour at the time of the accident. He testified that he was driving on the highway at the time of the accident. He testified that he was driving at a speed of about 40 miles per hour at the time of the accident.

The instruction was given in the jury room by the court. The instruction was given in the jury room by the court. The instruction was given in the jury room by the court. The instruction was given in the jury room by the court. The instruction was given in the jury room by the court. The instruction was given in the jury room by the court. The instruction was given in the jury room by the court. The instruction was given in the jury room by the court. The instruction was given in the jury room by the court. The instruction was given in the jury room by the court.

Without distinguishing, as a matter of law, between an action for willful, wanton and malicious negligence and one in which the negligence was not willful, wanton and malicious. Having submitted the case upon that theory, it will be reviewed by this court from that standpoint.

In the absence of other errors assigned upon the record, we hold the contention of defendant that the verdict is against the manifest weight of the evidence is unavailing. The accident through which plaintiff was injured occurred Sunday, September 8, 1931, at about five o'clock p. m. Plaintiff was living at 1000 Forsythville Avenue, was at that time riding with her relatives, Mr. and Mrs. James H. Smith, who resided at 1000 Calumet Avenue. Mr. and Mrs. H. H. Smith called for plaintiff; they were driving a Chrysler car, which was owned and driven by them.

Five from Forsythville Avenue to 4th Street, a public highway

extending east and west. They proceeded west on 46th street and approached Michigan avenue, another public highway which extends north and south. On the east side of Michigan avenue was a sidewalk about eight feet wide. There was a stop sign on the northeast corner, and Mr. Nunley says there was a terrace just ahead of the sidewalk about 17 or 18 feet wide, and that the distance between the curbstone and the sidewalk was about 17 feet. The stop sign was about a foot east of the east sidewalk of South Michigan avenue and about 25 feet from the highway. The traffic on Michigan avenue was proceeding north on the east side of the street and the Nunleys testified that they stopped their car east of Michigan avenue, waiting for the north and south traffic to pass; that during that time defendant approached from the south going north on Michigan; that she came at a "pretty good speed." Mr. Nunley says: "She got to the corner and a few feet from the corner she made a sudden turn like this (indicating.) My car was setting over on the northeast corner and she ran right into my car and knocked it up on the side curb." He says that his car was about three feet from the north curb of 46th street and was north of the center line of 46th street when the car of defendant struck it and knocked it over the curbstone, injuring plaintiff.

Defendant, on the contrary, says that at the time in question she was driving north on Michigan avenue near 46th street; that she had come from Garfield boulevard and was going directly north on Michigan to her home at 3812 North Pine^{Grove} avenue; that as she approached 46th street she was driving about 20 miles an hour; that there was a car ahead of her and one or two cars back of her; that she did not notice the car in which plaintiff was riding until she (defendant) was within three or four feet of the south curb; that the car in which plaintiff was riding was then about ten feet east of the corner on 46th street; that the Nunley car was then going about 15 or 20 miles an hour and that it came out

extending east and west. They proceeded west on 45th Street and
approached 46th Street, leaving 45th Street which extends
east and west. On the west side of 45th Street there was a line
with about eight feet wide. There was a sign on the north
corner, and Mr. Murphy says there was a person just ahead of
the sidewalk about 15 or 18 feet wide, and that the distance be-
tween the sidewalk and the sidewalk was about 15 feet. The sign
was about a foot east of the east sidewalk of South Michigan
Street and about 25 feet from the highway. The traffic on 45th
Street was proceeding north on the east side of the street
and the Murphy testified that they stopped their car east of
45th Street, waiting for the water and sewer traffic to pass;
that during that time defendant approached from the north riding
west on 45th Street; that she came out a "pretty good speed," Mr.
Murphy says: "She got to the corner and a few feet from the
corner she made a sudden turn like this (indicating). My car
was sitting over on the northeast corner and she ran right into my
car and knocked it on its side and." He says that his car was
west about 100 feet from the north curb of 45th Street and was north
of the center line of 45th Street when the car of defendant struck
it and knocked it over the sidewalk, injuring plaintiff.
Defendant, on the contrary, says that at the time in ques-
tion she was driving west on Michigan Avenue east 45th Street;
that she had come from 45th Street and was riding directly
north on Michigan to her home at 2312 North Michigan; that as
she approached 45th Street she was driving about 20 miles an
hour; that there was a car ahead of her and one or two cars back
of her; that she did not notice the car in which plaintiff was riding
until she (defendant) was within three or four feet of the south
curb; that the car in which plaintiff was riding weathered about
ten feet east of the corner on 45th Street; that the female car
was then going about 15 or 20 miles an hour and that it came out

about the whole length of the car into Michigan avenue; that defendant turned to the right quickly and applied the brakes, and in that way the front wheel of her car came into contact with the rear wheel or tires of the Nunley car; that she was about three or four feet from the Nunley car when it came to a stop, and that Nunley was driving along the center of the street. Defendant says that she got out of her car after the accident, and that the people in the Nunley car immediately went across the street to some building, and that Mr. Nunley did not come back for about ten minutes; that she called for an officer but could not find one; that Mr. Nunley asked her for her name and address, which she gave him. She says that she was not injured and did not see anybody in the other car injured. She says positively that Nunley's car was almost full length into the street; that between the rear of his car and the east curbstone of Michigan there were probably four or five feet; that the front part of his car was out in the center anyway; that her car was a LaSalle about five feet wide; that she turned east to avoid hitting the hood of Nunley's car and hit the rear wheel; that there was not enough space for another automobile to pass between the curb and her car when it was standing there after the accident.

Florence Riley testified for defendant that she saw the accident; that she was riding in an automobile with a Mr. Nugent, who was at the time of the trial somewhere in the east; that she was riding north on Michigan avenue behind the defendant's north-bound car that was involved in the accident and about three or four feet from the right-hand curb; that as they approached 46th street the car in which she was riding was being driven about 20 to 25 miles an hour, and that defendant's car was being driven at about the same speed; that as they approached 46th street she saw the Nunley car in 46th street; that when she first saw the car it

about the whole length of the car into Michigan avenue; that he-
 reached about the rear of the car and that he
 in that way the front wheel of her car came into contact with
 the rear wheel on the left of the Kunkley car; that she was about
 three or four feet from the Kunkley car when it came to a stop, and
 that Kunkley was driving along the center of the street. Defendant
 says that she got out of her car after the accident, and that she
 people in the Kunkley car immediately went across the street to
 was riding, and that Mr. Kunkley did not come back for about ten
 minutes; that she called for an officer but could not find one;
 that Mr. Kunkley asked her for her name and address, which she
 gave him. She says that she was not injured and did not see any-
 body in the other car injured. She says positively that Kunkley's
 car was almost full length into the street; that between the rear
 of his car and the seat cushions of Michigan there were probably
 four or five feet; that the front part of his car was out in the
 center anyway; that her car was a Landolle about five feet wide;
 that she turned east to avoid hitting the hood of Kunkley's car
 and hit the rear wheel; that there was not enough space for
 another automobile to pass between the curb and her car when it was
 standing there after the accident.

THOMAS KILPATRICK, testified that she was the
 accident; that she was riding in an automobile with a Mr. Wagon,
 who was at the time of the trial somewhere in the east; that she
 was riding north on Michigan avenue behind the defendant's north-
 bound car that was involved in the accident and about three or
 four feet from the Michigan curb; that as they approached the
 street the car in which she was riding was being driven about 20
 to 25 miles an hour, and that defendant's car was being driven at
 about the same speed; that as they approached 4800 street she saw
 the Kunkley car in 4800 street; that when she first saw the car it

was about a length or a length and a half of the car back of the east line of Michigan avenue, - about fifteen feet; that it was going at about the same speed as defendant's car; that when it proceeded into Michigan avenue, defendant's car was almost up to 46th street; that the Nunley car was driven almost the full length of the car past the east line of Michigan and then stopped; that defendant turned to the right and her front wheel hit the rear wheel of the other car. This witness says that she did not know defendant or any of the parties in the other car before the accident. She says that defendant's car was just a little way from the Nunley car when it stopped in Michigan avenue; that defendant was almost up to it and then turned, about four or five feet, when she came to a stop. The witness says that she waited to see if anyone was hurt; that Mr. Nugent gave Mrs. Langdon his name and then drove on north behind Mrs. Langdon. She is positive that the car which collided with defendant's car was standing almost in the center of the street.

The witness, who appears to have been impartial, seems to us to give the more reasonable narration as to the manner in which this accident occurred. The record fails to show any reason why defendant should have turned her car to the east on 46th street in the manner plaintiff's witnesses describe. Defendant lived north, was going north, and there was no reason so far as the evidence discloses why defendant should have turned east into 46th street, and we think it quite improbable that she did so. It is not denied that the damage to the Nunley car was at the rear part of it, and this fact is quite consistent with the narration defendant gives of the accident. We hold that the verdict of the jury is therefore against the manifest weight of the evidence, and the judgment must be reversed for that reason.

We think, too, the court erred in sustaining objections

was about a length or a length and a half of the car back of the east line of Michigan Avenue, - about fifteen feet; that it was going at about the same speed as defendant's car; that when it proceeded into Michigan Avenue, defendant's car was almost up to 48th Street; that the Knutson car was driven almost the full length of the car past the east line of Michigan and then stopped; that defendant turned to the right and her front wheel hit the rear wheel of the other car. This witness says that she did not know defendant or any of the parties in the other car before the accident. She says that defendant's car was just a little way from the Knutson car when it stopped in Michigan Avenue; that defendant was almost up to it and then turned, about four or five feet, when she came to a stop. The witness says that she waited to see if anyone was hurt; that Mr. Nugent gave her, "Listen, his name was then drove on north behind Mrs. Langdon. She is positive that the car which collided with defendant's car was standing almost in the center of the street.

The witness who appears to have been impartial, seems to me to give the more reasonable narration as to the manner in which this accident occurred. The record fails to show any reason why defendant should have turned her car to the east on 48th Street in the manner plaintiff's witness describes. Defendant lived north, was going north, and there was no reason so far as the evidence discloses why defendant should have turned east into 48th Street, and we think it quite improbable that she did so. It is not denied that the damage to the Knutson car was at the rear part of it, and this fact is quite consistent with the narration defendant gives of the accident. We hold that the verdict of the jury is therefore against the manifest weight of the evidence, and the judgment must be reversed for that reason.

to questions asked by the attorney for defendant for the purpose of disclosing the speed at which the Sunley car was being driven at the time it approached Michigan avenue. The court several times sustained objections to such questions, holding that this fact was not material. It had an important bearing upon the reasonableness of the story as told by the respective parties, and the objection should not have been sustained.

There are other alleged errors which it will be unnecessary to discuss. For those we have indicated, the judgment must be reversed and the cause remanded for another trial.

REVERSED AND REMANDED.

McSurely, P. J., and O'Connor, J., concur.

It is further stated by the attorney for defendant for the purpose of illustrating the speed at which the Buick car was being driven at the time it commenced skidding across the road several times mentioned objectives on each occasion, stating that this fact was not material. It was so stated insofar as the circumstances of the case as well as the defendant's driver, and the objection will not be sustained.

36318

JOHN E. MADDEN and JAMES M. MADDEN,
Executors, etc.,

Appellees,

vs.

MRS. P. P. FLAHERTY,

Appellant.

APPEAL FROM SUPERIOR COURT
OF COOK COUNTY.

270 I.A. 618³

MR. JUSTICE MATCHETT DELIVERED THE OPINION OF THE COURT.

Plaintiffs, executors of the estate of John E. Madden, sued in assumpsit, in their amended declaration declaring upon a promissory note of defendant, Mrs. P. P. Flaherty, for the sum of \$1500, made February 21, 1929, due November 1, 1929. The common counts were attached, and there was an affidavit of claim with copy of the account sued on.

Defendant filed a plea of the general issue and another plea of partial failure of consideration. In the latter plea it was alleged that the note sued on was given in payment of the purchase price of the interest of plaintiffs' decedent in certain horses, and that the consideration on the part of defendant and upon which she entered into the contract was the right and privilege on her part to return the horses or the survivor of them at any time within two years and while the same were being used by defendant for racing purposes (the horses being race horses and purchased for that purpose); that defendant within said period offered to return the horses to plaintiffs but plaintiffs refused to accept them, causing great loss and damage in the cost and expense of maintaining, keeping, caring for, feeding and transporting the horses in a sum greatly exceeding the amount of the note. There was also a plea of set-off, alleging an indebtedness due from plaintiffs to defendant for failure to accept and receive from defendant the horses for which the note was given.

JOHN E. HARRIS and JAMES E. HARRIS
Executors, etc.

Appellants

vs.

WILLIAM P. HARRIS
Appellee

Appellant

IN COMMON COURT

270 I.A. 618

THE JUDICIAL COUNCIL HAS REVIEWED THE DECISION OF THE COURT.

Plaintiff, executor of the estate of John E. Harris, was in possession of the property in dispute at the time of the death of the decedent. The defendant, William P. Harris, claims that the property was wrongfully taken from him. The court has found in favor of the plaintiff, and the defendant's appeal is dismissed. The court also awarded costs to the plaintiff.

The court has also reviewed the decision of the court in the case of the executor of the estate of John E. Harris. The court has found that the executor acted properly in the distribution of the estate. The court also awarded costs to the executor. The court has also reviewed the decision of the court in the case of the executor of the estate of John E. Harris. The court has found that the executor acted properly in the distribution of the estate. The court also awarded costs to the executor.

An affidavit of merits was attached wherein P. P. Flaherty, as the authorized agent of defendant, averred that defendant had a meritorious defense to the whole demand and that the note was given for the purchase price of the race horses Linda, Milton, Moore and Strike; that previous to the giving of the note John E. Madden had sold to defendant a half interest in the horses for which she paid \$6,000 cash and agreed to pay a balance of \$6,000 under certain terms and conditions then entered into; that during the period of possession of the horses for racing purposes (it appearing that it was impossible to successfully comply with the terms of the partnership arrangement), Madden and defendant entered into a new arrangement whereby Madden sold defendant his interest in the horses for \$3,000, giving her credit for \$1500, which was allowed affiant on certain commissions; further that it was expressly agreed as the consideration for the execution of the note that if at any time thereafter defendant desired to return the horses or survivors, decedent would receive them in full payment of the note or of any balance due, and cancel the note; that in December, 1926, Linda died; that it became apparent defendant could not continue under the agreement without entailing heavy losses; that the remaining horses were unable to win races; that it was impossible to keep up the expense of maintaining them; that defendant's help had left and it was folly to intrust the horses to the hands of others; that she then offered to return the horses and waive any rebate on account of cash paid as part of the consideration; that plaintiffs refused to keep the agreement and notified defendant they would not accept the horses; that after holding the horses at an expense and loss of \$1300 defendant was compelled to sell them at an additional loss which greatly exceeded the amount of plaintiffs' claim; that plaintiffs refused to accept and sell the horses at public auction at the large breeding establishment of decedent, continued by

an affidavit of Martin was attached wherein W. M. Flaherty, as the authorized agent of defendant, averred that defendant had a conversation with the whole board and that the note was given for the purchase price of the two horses listed, Miller, Moore and Griggs; that previous to the giving of the note John E. Madden had sold to defendant a half interest in the horses for which the paid \$5,000 cash and agreed to pay a balance of \$5,000 under certain terms and conditions then entered into; that during the period of possession of the horses for trading purposes (it appearing that it was impossible to successfully comply with the terms of the trading arrangement), Madden and defendant entered into a new arrangement whereby Madden sold defendant his interest in the horses for \$10,000, giving but reserving the \$5,000, which was advanced by defendant as certain proceeds; Madden then in the company of defendant as the consideration for the acquisition of the note that it be any time thereafter, defendant desired to return the horses or survivors, defendant would receive them in full payment of the note or of any balance due, and cancel the note; that in December, 1944, Madden stated that it became apparent defendant would not continue under the agreement without satisfaction every interest; that the remaining horses were unable to win races; that it was impossible to keep up the expense of maintaining them; that defendant's help had left and it was fully to interest the horses as the hands of others; that who then offered to return the horses and waive any debate on account of cash paid as part of the consideration; that defendant refused to keep the agreement and notified defendant they would not accept the horses; that after holding the horses at an expense and loss of \$10,000 defendant was compelled to sell them at an additional loss when they were sold for the amount of \$10,000; that defendant refused to accept and sell the horses at public auction at the large breeding establishment of defendant, continued by

plaintiffs, where frequent sales were held; that defendant's claim exceeded the claim of plaintiffs by \$500.

There were replications to the effect that decedent did not agree to receive the horses or survivors of them, as alleged, and that defendant did not offer to return the horses and plaintiffs did not refuse to accept them; that the consideration had not failed.

The cause was tried by a jury. The note was offered in evidence. Defendant produced as a witness in her behalf her husband, P. P. Flaherty, and offered to prove by him the facts constituting the defense as set up in her pleas. Plaintiffs objected on the ground that the witness was incompetent under section 2 of the Evidence act (Smith-Hurd's Ill. Rev. Stats., 1931, chap. 51, sec. 2, p. 1473.) The objection was sustained, and at the close of the case plaintiffs moved that the set-off of defendant be dismissed; that the court exclude from the jury all the evidence offered and received on the part of defendant and instruct the jury to return a verdict for plaintiffs. The motion was allowed, a verdict was returned for plaintiffs in the sum of \$1500, and the court after overruling the motions of defendant for a new trial and in arrest of judgment, entered judgment for that amount on the verdict.

Defendant has appealed and argues as error the exclusion of the evidence of her husband as incompetent under the statute. That is the controlling question in the case.

At common law the parties to a suit were incompetent as witnesses, and the husband and wife were not competent witnesses for or against each other in suits between them and other parties. Their competency depends entirely upon the statute. In so far as the statute provides only and no further are they competent. By section 1 of the Evidence act in this State it is provided that

plaintiff, wherefore defendant was held responsible for the claim
exceeded the claim of plaintiff by \$500.

There were objections to the effect that defendant did
not agree to receive the horses of plaintiff or them, as alleged,
and that defendant did not offer to return the horses and plain-
tiff did not return to answer them, that the commission was
not valid.

The case was tried by a jury. The case was offered in
evidence. Defendant produced as a witness in her behalf her
husband, J. P. Wicks, and offered to prove by him the facts
constituting the claim as set up in her claim. Plaintiff ob-
jected on the ground that the witness was incompetent under sec-
tion 1 of the Evidence Act (Mich. Comp. Laws, 1929, § 1001,
chap. 21, sec. 2, p. 1475). The objection was sustained, and at
the close of the case plaintiff moved that the verdict of defendant
be dismissed; that the court examine from the jury all the evidence
offered and received on the part of defendant; and that the jury
be returned a verdict for plaintiff. The motion was allowed, a
verdict was returned for plaintiff in the sum of \$1500, and the
court after overruling the motion of defendant for a new trial

and in arrest of judgment, entered judgment for that amount on the
verdict.

Defendant has moved for a writ of error to reverse
of the evidence of her husband as incompetent under the statute.
That is the controlling question in the case.

At common law the parties to a suit were incompetent as
witnesses, and the husband and wife were not competent witnesses
for or against each other in suits between them and other parties.
Their competency depends essentially upon the statute. In no law as
the statute provides only that no husband and wife competent. In
section 1 of the Evidence Act in this State it is provided that

no person shall be disqualified as a witness in any civil action, suit or proceeding, except as thereafter stated, by reason of his interest in the event thereof, as a party or otherwise, or by reason of his conviction of any crime, but that such interest or conviction may be shown for the purpose of affecting the credibility of such witness. Section 2 of the act provides in substance that no party to any civil action, suit or proceeding, or person directly interested in the event thereof, shall be allowed to testify therein of his own motion, or in his own behalf, by virtue of section 1, when any adverse party sues or defends as the trustee or conservator of any idiot, habitual drunkard, lunatic or distracted person, or as the executor, administrator, heir, legatee or devisee of any deceased person, or as guardian or trustee of any such heir, legatee or devisee, unless when called as a witness by such adverse party so suing or defending, and also except in five different cases mentioned, no one of which is material here. Section 5 of the same act provides that no husband or wife shall by virtue of section 1 be rendered competent to testify for or against each other as to any transaction or conversation occurring during the marriage, whether called as a witness during the existence of the marriage, or after its dissolution, except in cases where the wife would, if unmarried, be plaintiff or defendant, or where the cause of action grows out of the neglect of the husband to provide the wife with suitable support, except in cases where the litigation shall be concerning the separate property of the wife and suits for divorce, etc.

It is contended in behalf of defendant that by reason of these provisions of section 5 the husband was competent to testify in this suit in favor of his wife because the litigation concerns her separate property; and a number of cases such as Cassens v. Heustig, 201 Ill. 208; Booker v. Booker, 208 Ill. 539,

no person shall be disqualified as a witness in any civil action, suit or proceeding, except as hereinafter stated, by reason of his interest in the event thereof, as a party or otherwise, or by reason of his conviction of any crime, but that such interest or conviction may be shown for the purpose of affecting the credibility of such witness. Section 2 of the act provides in substance that no party to any civil action, suit or proceeding, or person directly interested in the event thereof, shall be allowed to testify therein of his own motion, or in his own behalf, by virtue of section 1, when any adverse party takes an objection as the ground or basis of any issue, material circumstance, fact, or disputed point, or as the basis of any question of law or fact, or of any issue of law or fact, which is called in question by such adverse party as being or determining, and also except in the different cases mentioned, no one of which is excepted. Section 3 of the act says that no person shall be rendered competent to testify for or against each other as to any transaction or conversation occurring during the marriage, whether called as a witness during the existence of the marriage, or after its dissolution, except in cases where the wife would, if unmarried, be plaintiff or defendant, or where the cause of action grows out of the neglect of the husband to provide the wife with suitable support, except in cases where the litigation shall be concerning the separate property of the wife and suits for divorce, etc.

It is contended in behalf of defendant that by reason of those provisions of section 2 the husband was competent to testify in this suit in favor of his wife because the litigation concerned her separate property, and a number of cases such as Barrett v. Barrett, 101 Ill. 2d 111, 1881, 1882, 1883, 1884, 1885, 1886, 1887, 1888, 1889, 1890, 1891, 1892, 1893, 1894, 1895, 1896, 1897, 1898, 1899, 1900, 1901, 1902, 1903, 1904, 1905, 1906, 1907, 1908, 1909, 1910, 1911, 1912, 1913, 1914, 1915, 1916, 1917, 1918, 1919, 1920, 1921, 1922, 1923, 1924, 1925, 1926, 1927, 1928, 1929, 1930, 1931, 1932, 1933, 1934, 1935, 1936, 1937, 1938, 1939, 1940, 1941, 1942, 1943, 1944, 1945, 1946, 1947, 1948, 1949, 1950, 1951, 1952, 1953, 1954, 1955, 1956, 1957, 1958, 1959, 1960, 1961, 1962, 1963, 1964, 1965, 1966, 1967, 1968, 1969, 1970, 1971, 1972, 1973, 1974, 1975, 1976, 1977, 1978, 1979, 1980, 1981, 1982, 1983, 1984, 1985, 1986, 1987, 1988, 1989, 1990, 1991, 1992, 1993, 1994, 1995, 1996, 1997, 1998, 1999, 2000, 2001, 2002, 2003, 2004, 2005, 2006, 2007, 2008, 2009, 2010, 2011, 2012, 2013, 2014, 2015, 2016, 2017, 2018, 2019, 2020, 2021, 2022, 2023, 2024, 2025, 2026, 2027, 2028, 2029, 2030, 2031, 2032, 2033, 2034, 2035, 2036, 2037, 2038, 2039, 2040, 2041, 2042, 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and Kostlan v. Pavelka, 261 Ill. App. 71, are cited. Those cases state a rule which is applicable in a certain class of cases but are not, as we hold, applicable where, as here, the suit is of that class from which ^{all} defendants are excluded as witnesses by the exceptions named in section 2. In other words, the suit here being by the executors of an estate, both husband and wife were disqualified. The question has been passed on in numerous cases and is so well settled as to make a lengthy discussion unnecessary. In Treleaven v. Dixon, 119 Ill. 548, the Supreme court, expressly overruling a former decision to the contrary, (Marshall v. Pack, 91 Ill. 187) stated:

"** other parties can not testify in any civil action, suit or proceeding, of their own action or in their own behalf, when any adverse party sues or defends as the executor of a deceased person, and therefore husband and wife can not testify for or against each other in those instances."

Other cases to the same effect are Pyle v. Gustatt, 92 Ill. 206; Mann v. Forein, 166 Ill. 446; Mainitz v. Dennis, 216 Ill. 487; Lingle v. Bulfer, 322 Ill. 606; Giffert v. McGuern, 91 Ill. App. 387; Hamilton v. Chaffee, 159 Ill. App. 54; Platt v. Williams, 175 Ill. App. 1.

In conformity with these rulings we hold that the court did not err in excluding the evidence offered, and there being no evidence tending to sustain the defense set up in the pleas, the court properly instructed a verdict for plaintiffs. The judgment is therefore affirmed.

AFFIRMED.

McSurely, P. J., and O'Connor, J., concur.

and Marshall v. Marshall, 201 Ill. 409, VI, are cited. These cases state a rule which is applicable in a certain class of cases but

are not, as we hold, applicable where, as here, the rule is of that class from which exceptions are excluded as witnesses by the exceptions named in section 2. In other words, the rule here

being by the operation of an estate, both husband and wife were disqualified. The question has been passed on in numerous cases and is so well settled as to make a lengthy discussion unnecessary.

In Marshall v. Marshall, 201 Ill. 409, the Supreme Court, expressly reversing a former decision to the contrary, (Marshall v. Marshall,

201 Ill. 409) held:

"That either party may now testify in any civil action, and is not excluded, at least on motion or in their own behalf, when any adverse party seeks or claims an exclusion of a deceased husband and wife on the ground that they are not competent to testify for or against each other in such instances."

Other cases in the same line are Marshall v. Marshall, 201 Ill. 409;

Marshall v. Marshall, 201 Ill. 409; Marshall v. Marshall, 201 Ill. 409;

Marshall v. Marshall, 201 Ill. 409; Marshall v. Marshall, 201 Ill. 409;

Marshall v. Marshall, 201 Ill. 409; Marshall v. Marshall, 201 Ill. 409.

XII. App. 1.

In conformity with these rulings we hold that the court did not err in excluding the evidence offered, and there being no evidence tending to sustain the defense set up in the plea, the court properly instructed a verdict for plaintiffs. The judgment is therefore affirmed.

ATTEST:

Respectfully, J. J. and O'Connor, Attorneys.

36379

J. RAND, Doing Business as
RANDCRAFT CLOTHES,
Appellee.

vs.

A. STARSIAK,
Appellant.

APPEAL FROM MUNICIPAL COURT
OF CHICAGO.

270 I.A. 618⁴

MR. JUSTICE MATCHETT DELIVERED THE OPINION OF THE COURT.

Plaintiff in an action on contract filed a statement of claim alleging items due from defendant on account and accruing from August 7, 1931, to December of the same year, for men's clothing sold and delivered to defendant at his special instance and request to the total amount of \$1712.51, on which a credit by check dated January 26, 1932, for \$200 was allowed, leaving a balance in the sum of \$1512.51.

Defendant filed an affidavit of merits in which he averred that at the time of purchasing the merchandise plaintiff did "expressly warrant and agree that the said merchandise shall (be) fit for the purposes for which it was sold, namely, that it would be fit for mercantile and marketable use; and the plaintiff did then and there at the various times aforesaid expressly agree with this affiant that the said goods and merchandise, if and when it should prove to be unfit for the use as aforesaid that this affiant shall return the same and receive credit therefor;" that the merchandise when delivered to him were misfits; that the alleged suits were not matched with each other and that each suit contained pieces which were not matched with themselves in color and size; further, that on February 18, 1932, in compliance with the express warranties and agreements aforesaid and upon discovering the breach, defendant returned the merchandise totalling at invoice price the sum of \$1500, being the same merchandise for which plaintiff sought

1000

U. S. DEPT. OF JUSTICE
WASHINGTON, D. C.

RECEIVED
JAN 10 1933

STANDARD

MR. JUSTICE DELIVERING THE OPINION OF THE COURT.

It is an action on contract filed in the District Court of the United States for the District of Columbia, to enforce the payment of a debt of \$100.00, due from the defendant to the plaintiff. The complaint alleges that the defendant, on or about the 1st day of January, 1932, borrowed of the plaintiff the sum of \$100.00, and that the defendant has failed to pay the same.

The defendant denies the allegations of the complaint, and claims that the money was paid to him by the plaintiff. The plaintiff claims that the money was paid to her by the defendant. The court finds that the plaintiff has proved her case by a preponderance of the evidence. The defendant's evidence is not sufficient to rebut the plaintiff's case. The court therefore grants judgment in favor of the plaintiff for the sum of \$100.00, with interest thereon from the date of the filing of the complaint until payment.

to recover, and that defendant was therefore entitled to a credit for the difference between the amount of the merchandise returned to plaintiff and the amount of plaintiff's claim.

There was a trial by the court which found against defendant for the sum of \$1512.51. After motions by defendant for a new trial and in arrest had been overruled judgment was entered on the verdict.

It is urged that the court erred in refusing a motion to find for defendant; that plaintiff failed to maintain the burden of proof; that the finding was contrary to the law and the manifest weight of the evidence; that credit should have been given for the merchandise returned to the value of \$1500, and that the judgment if any, should have been for the sum of \$15.12.

At the beginning of the trial plaintiff insisted that because the facts averred in the statement of claim were not specifically denied in the affidavit of merits the burden of proof was cast on defendant to prove his alleged defense. Defendant insisted on the contrary that plaintiff should first "prove" his "count." The court held with plaintiff, and this is the first alleged error assigned and argued.

Defendant cites Woodlawn Security Finance Corp. v. Doyle, 252 Ill. App. 68, where a defendant to a judgment entered by confession was upon his instance permitted by the court to present his defense first. The Appellate court held this was not the correct practice. The court, however, on the authority of Morris v. Taylor, 199 Ill. App. 538, held further that the rights of the litigants had not been thereby prejudiced.

While in this case we think the court might well have required, in the first instance, formal proof of a computation of the amount due, we are not disposed to hold that any error of procedure in this regard was prejudicial. The affidavit of

to recover, and that defendant was therefore entitled to a credit for the difference between the amount of the merchandise returned to plaintiff and the amount of plaintiff's claim.

There was a trial by the court which found against defendant for the sum of \$1212.11. After judgment by the court for a new trial and in arrest had been overruled judgment was entered on the verdict.

It is urged that the court erred in refusing a motion for that the defendant, that plaintiff failed to establish the value of goods, that the finding was contrary to the law and the weight of the evidence; that credit should have been given for the merchandise returned to the value of \$1200, and that the judgment is wrong, should have been for the sum of \$12.11.

At the beginning of the trial plaintiff testified that because the facts stated in the statement of claim were not specifically stated in the affidavit of service the writ of habeas was sent on defendant to prove his alleged defense. Defendant is alleged to have averred that plaintiff should first "prove" his "claim." The court held with plaintiff, and this is the first alleged error assigned and argued.

Two issues arise from plaintiff's alleged error.
First, the court's failure to assign a judgment entered by defendant was upon his instance permitted by the court to present the defense first. The defendant's court bill was not the correct practice. The court, however, on the authority of WILLIAMS V. HARRIS, 109 Ill. App. 503, held further that the rights of the litigants had not been thereby prejudiced.

While in this case we think the court might well have required, in the first instance, formal proof of a computation of the amount due, we are not disposed to hold that any error of procedure in this regard was prejudicial. The affidavit of

merits did not specifically or by implication deny the facts averred in the statement of claim. See section 8, rule 15 of the Municipal court, of which we take judicial notice. See also Meacham v. Lobdell, 198 Ill. App. 359; Board of Education v. Chicago Bonding & Surety Co., 218 Ill. App., 20; Grand Trunk Western Ry. Co. v. Hales & Hunter Co., 233 Ill. App. 109.

In the evidence offered by defendant there was a suggestion that some of the goods had been sold by sample, and it is suggested that the goods delivered were not in design and quality equal to the sample. Defendant cites section 16 of the Sales act. (Smith-Murd's Ill. Rev. Statutes, 1931, chap. 121½, sec. 16.) This supposed defense was evidently an afterthought. It was not set up in the affidavit of merits, and the evidence upon the point is not sufficient to establish the defense, even if it had been pleaded.

It is next contended that there was an implied warranty that the goods were suitable for a special purpose. Here again no such defense is set up in the affidavit of merits, nor is there proof in the record upon which such defense might be sustained.

It is further argued that where goods received prove to be defective and the seller informs the buyer that he should try to sell the same, and if unable to do so, to return it, the buyer has the right to return the goods to the seller. House v. Beak, 141 Ill. 290, and Spring v. Slayden Kirksey Woolen Mills, 106 Ill. App. 579, are cited. House v. Beak, however, involved a case in which a contract of sale, or return, by a wholesaler to a retailer was construed, and the evidence showed goods were simply placed on consignment. That was not the situation here. On the contrary the goods were sold and delivered, thus passing the title at once to the vendee.

The Spring v. Slayden Kirksey Woolen Mills case decided

...the goods were sold by the defendant to the plaintiff...
...the goods were sold by the defendant to the plaintiff...
...the goods were sold by the defendant to the plaintiff...

In the evidence offered by the defendant there was a suggestion that some of the goods had been sold by the plaintiff, and it is suggested that the goods delivered were not in the same condition as the goods. The defendant also stated that the goods were sold to the plaintiff. The plaintiff also stated that the goods were sold to the plaintiff. The plaintiff also stated that the goods were sold to the plaintiff. The plaintiff also stated that the goods were sold to the plaintiff.

It is not contended that there was an implied warranty that the goods were suitable for a special purpose. It is not contended that the goods were suitable for a special purpose. It is not contended that the goods were suitable for a special purpose. It is not contended that the goods were suitable for a special purpose. It is not contended that the goods were suitable for a special purpose.

It is further argued that where goods are sold to a retailer and the retailer delivers the goods to the plaintiff, the plaintiff has the right to return the goods to the retailer. It is further argued that where goods are sold to a retailer and the retailer delivers the goods to the plaintiff, the plaintiff has the right to return the goods to the retailer. It is further argued that where goods are sold to a retailer and the retailer delivers the goods to the plaintiff, the plaintiff has the right to return the goods to the retailer.

that where goods had been sold by sample, it was a condition precedent that the goods when delivered should correspond in kind, character and quality to the same by which the sale was made. There is no doubt that is the general rule of law, but no such defense in this case is either set up in the affidavit of merits or proved by the evidence.

Defendant finally contends (and this is the controlling question in the case) that the judgment is against the manifest weight of the evidence, and that it is the duty of this court to set aside such judgment for that reason. That law is unquestioned. In this case the evidence shows that the sales were made on the dates alleged in the statement of claim and that the goods were delivered at about these times. The alleged defects in the goods would have been apparent upon inspection. The goods were delivered for return February 17, 1932. There is uncontradicted evidence to the effect that after the bills for these goods were rendered, defendant made a payment of \$200 on the account and promised he would later send a check for the balance. The trial Judge saw the witnesses and had a much better opportunity than we to weigh their testimony. He expressed the opinion that the attempt to return the goods was made because of a fall in the market prices for such merchandise. We think his inference was justified under all the evidence, and the judgment is affirmed.

AFFIRMED.

McSurely, P. J., and O'Connor, J., concur.

that where goods had been sold by sample, it was a condition precedent that the goods were to be of the same quality as the sample. There is no doubt that is the general rule of law, but as regards evidence in this case is either set up in the affidavit of service as proved by the evidence.

Defendant finally contends (and this is the controlling question in the case) that the judgment is against the maintain weight of the evidence, and that is in the way of this court is not aside such judgment for that reason. That law is undisputed. In this case the evidence shows that the goods were made on the dates alleged in the statement of claim and that the goods were delivered as stated in the bill. The alleged defects in the goods would have been apparent upon inspection. The goods were delivered to the plaintiff on 15th May 1934. There is no evidence that the effect that after the bill for those goods were received, the defendant made a payment of \$500 on the account and received a receipt later sent a check for the balance. The trial judge saw the witnesses and had a much better opportunity than we to weigh their testimony. He expressed the opinion that the attempt to return the goods was made because of a fall in the market price for such merchandise. We think his inference was justified under all the evidence, and the judgment is affirmed.

APPEAL.

Respectfully, W. J. and O'Connor, J., counsel.

THE PEOPLE OF THE STATE OF ILLINOIS,
Defendant in Error,

vs.

HERMAN J. GOLDBERG,
Plaintiff in Error.

ERROR TO CRIMINAL COURT
OF COOK COUNTY.

270 I.A. 619¹

MR. JUSTICE MATCHETT DELIVERED THE OPINION OF THE COURT.

Herman J. Goldberg with others was indicted for conspiracy to defraud Cook County. See Cahill's Ill. Rev. Stats. 1931, chap. 38, par. 117, sec. 1. The indictment was in three counts. The first charged a conspiracy to defeat and defraud by changing and altering books kept in the office of the Board of Assessors and the Board of Review; the second, a conspiracy "to alter, falsify, avoid and deface said books, record and documents contrary to the statute," etc.; the third, a conspiracy to bribe certain employees on matters pending before the Boards.

Defendant was arraigned and a plea of not guilty was entered. He waived trial by jury, the cause was submitted to the court, which June 30, 1931, entered a finding that defendant was guilty in manner and form as charged in the indictment, and entered judgment as follows:

"Therefore, it is considered, ordered and adjudged by the Court that the said Defendant, Herman J. Goldberg, is guilty of the said crime of Conspiracy in manner and form as charged in the indictment in this cause, on the said Finding of Guilty, and that he be and is hereby sentenced to confinement in the Common Jail of Cook County for said Crime of Conspiracy in manner and form as charged in the indictment whereof he stands convicted and adjudged guilty for the term of three (3) months from and after the delivery of the body of said Defendant, Herman J. Goldberg, to the Jailer of said County, and that the said Defendant, Herman J. Goldberg, be taken from the bar of the Court to the Common Jail of Cook County, from whence he came, and the Jailer of said County is hereby required and commanded to take the body of said Defendant Herman J. Goldberg, and confine him in said Jail, in safe and secure custody, and for and during the term of three (3) months."

In addition it was further ordered by the court that defendant should pay a fine of \$1000; that in default of payment of the fine

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TABLE 2: 1991-1992 AND CORRELATE TRUSTEE MOBILE

November 7, 1968, with reference was made to the fact that the defendant had been arrested on November 7, 1968, and that he had been released on bail on November 7, 1968.

Defendant was arrested and a search of his person was conducted. He advised that he had been arrested by the FBI on June 1, 1961, and was charged with the same offense as charged in the indictment, and was held in custody at the Federal House of Detention, New York City.

[illegible]

IN addition it was further observed by the court that defendant

at the expiration of three months defendant should be confined in the jail until the fine was paid, and that he be thereafter discharged. Defendant made a motion for a new trial which was continued from time to time. August 22, 1931, motions for a new trial and in arrest of judgment were overruled, and an order was entered allowing sixty days for a bill of exceptions upon motion of defendant to be released on probation. The cause was continued to the October term. Orders were from time to time entered extending the time for the filing of a bill of exceptions and staying the issuance of the mittimus. June 1, 1932, Judge Sabath denied the motion to release defendant on probation, as the abstract states, "For want of jurisdiction." By agreement the issuance of the mittimus was then stayed to June 6, 1932, upon which date an order was entered extending the time to file the bill of exceptions thirty days and staying the issuance of the mittimus for thirty days. This is the last order appearing in the record.

No bill of exceptions appears in this record. Defendant presents his case upon the common law record alone.

Some of the points do not demand extended consideration.

The briefs argue irregularity in the constitution of the grand jury, in that the record as originally filed shows that only twenty-two instead of the lawful twenty-three men were called. An amended record has been filed, however, which discloses that there were in fact twenty-three grand jurors; that the name of one of the jurors was omitted from the record, apparently by inadvertence. Moreover, there was no challenge to the array and therefore, (even if the objection had been based on fact) it could not be successfully urged here. Barron v. The People, 73 Ill. 256.

It is also contended that since the final judgment was entered June 30, 1931, and defendant was thereafter permitted to leave the court room and remain at large, the court was without jurisdiction

to enforce the judgment on August 11, 1932. Defendant does not state the record accurately upon this point. Defendant was required to enter into recognizance, which appears in the record, for his appearance after the date of sentence. Defendant cites The People v. Barrett, 203 Ill. 286; The People v. Shattuck, 274 Ill. 491. The record discloses great leniency toward this defendant but does not disclose facts such as existed in the cases cited and relied on where, after the return of a verdict, defendant was allowed to go without sentence being imposed upon him. Here, the judgment and sentence were entered upon the finding promptly, and except for stay orders entered at defendant's request the writtius for the imprisonment of defendant would have issued as a matter of course by the clerk of the court. As we have already said, the record discloses unusual favors to this defendant, but upon his own motion and at his own request. He is hardly in a position to contend that orders of the court entered through his insistence should now be held to constitute error such as would require a reversal of the judgment against him. The punishment of defendant has been long delayed, but that is no reason ^{it} why/should not be inflicted at all.

Defendant says that the penal clause of the statute does not authorize the imposition of a fine where, as here, the sentence pronounced is imprisonment in the county jail. He contends that upon a proper construction of the statute a fine may be imposed only in case the imprisonment is in the penitentiary. See Cahill's Ill. Rev. Stats. 1931, chap. 38, par. 117, sec. 1, p. 1010. We do not so interpret this section of the statute. The penalty provision is that "all parties to such conspiracy shall be liable to a penalty of not less than one hundred dollars, and not more than five thousand dollars, and to be imprisoned in the penitentiary for a term of not less than one year nor more than two years or imprisonment in the county jail for any period not exceeding two years." We construe this section

to enter the judgment on August 11, 1933. Defendant does not state
the record reflects any such entry. Defendant was released in
after into possession, which appears in the record, for his ap-
pearance after the date of sentence. Defendant also the People v.
Reynolds, was 111. 202; 111. 202; 111. 202, 1931. 1931.
Twenty thousand four hundred dollars (defendant) but does not
dispute facts such as existed in the case and relied on
there, after the return of a verdict, defendant was allowed to go
People v. Reynolds 111. 202; 111. 202; 111. 202, 1931. 1931.
same was entered upon the finding respectively, and entry for stay of
the entry of defendant's request the addition for the imprisonment
of defendant would have issued as a matter of course by the clerk of
the court. As we have already said, the record reflects nothing
favorable to this defendant, but upon his own motion and at his own re-
quest. He is hereby in a position to submit that order of the court
entered through his insistence should not be held to constitute error
and as such require a reversal of the judgment against him. The
judgment of defendant has been long delayed, but that is no reason
why it should not be affirmed as all.

Defendant says that the penal clause of the statute does not
impose the imposition of a fine there, as here, the sentence pro-
posed is imprisonment in the county jail. He contends that upon a
proper construction of the statute a fine may be imposed only in
case the imprisonment is in the penitentiary. See People v. 111. 202.
State. 1931, chap. 23, par. 117, sec. 1, p. 1010. It is not so.
Interpret this section of the statute. The penalty provided is that
"all persons so convicted shall be liable to a penalty of not
less than one hundred dollars, and not more than five thousand dol-
lars, and to be imprisoned in the penitentiary for a term of not less
than one year nor more than two years of imprisonment in the county
jail for any period not exceeding two years." We construe this section

of the statute to mean that in the discretion of the court a fine may be imposed and also imprisonment either in the penitentiary or in the county jail. The construction for which defendant contends would be (we hold) contrary to the plain intention of the legislature.

It is contended that the court erred in entering a single judgment on the general finding of guilty on the three counts in the indictment. This contention is based on the theory that the punishment provided for the crime described in one of the counts was different from the punishment allowed by law in the case of conviction on either one of the other two counts. Defendant contends that the sentence and judgment should have specified upon which counts the same were entered, and cites The People v. Barney, 217 Ill. App. 322; The People v. Steig, 258 Ill. App. 447; and The People v. Elliott, 272 Ill. 592. Defendant says that the indictment alleges different accusations brought under the different sections of the conspiracy law. We do not so understand this indictment.

We hold this judgment is not erroneous because entered upon the general finding of guilty without specifying the particular counts, and the cases cited by defendant do not sustain his contention.

In People v. Steig, 258 Ill. App. 447, there were three counts charging three distinct crimes under the Prohibition act: (1) unlawful sale, (2) unlawful possession, and (3) unlawful transportation of intoxicating liquors. Cahill's Ill. Rev. Stats., 1931, chap. 43, sec. 1, et seq. The jury found defendant guilty in manner and form as charged in the information. The court imposed a fine of \$300 and costs of suit under the first count, \$500 under the second count, and \$500 under the third count. The court also adjudged that defendant should be imprisoned in the county jail for ninety days and that he stand committed until fines and costs were paid. The judgment of imprisonment was not imposed under any specific count. It was the first offense by defendant for possession, and

the law did not provide both fine and imprisonment for a first offense of that kind. The minimum penalty under any count by way of imprisonment was sixty days. The Appellate court held that while the court might cumulate the punishment fixed on different counts, the punishment imposed under the different counts must be specified with reference to each count, and cited The People v. Barney, 217 Ill. App. 322, and The People v. Elliott, 273 Ill. 592.

These cases are applicable where the counts of an indictment charge separate and distinct offenses. That is not the case here. On the contrary, in this case these three counts charge only one offense, namely, that of conspiracy, and the essence of that crime is the unlawful combination, not the means used to carry out the objects of the combination. The indictment charges a single crime, in the separate counts and enumerates the different means used to attain the unlawful purpose. The same offense essentially, however, was declared in each of the counts. In such case, the judgment may be entered on a general verdict of guilty provided there is one good count. It was so held in The People v. Goldman, 313 Ill. 77, where one count charged larceny as bailee and another larceny by embezzlement. Also in The People v. Warfield, 261 Ill. 293, where it was held proper to join a count for conspiracy to obtain money and property by false pretenses with another count charging conspiracy to obtain the same money and property by means of the confidence game, although the judgment was reversed for other reasons. In conspiracy the gist of the offense is the unlawful combination, and it is not necessary to set out in detail in the indictment the means by which it was undertaken to accomplish the illegal purpose. The People v. Blumenberg, 271 Ill. 130; The People v. Schneider, 345 Ill. 410.

While there were three counts here the indictment charged only one conspiracy, namely, the one to defraud a municipality,

the law and practice with this and improvements for a time of
times of that kind. The minimum penalty under any count by way of
imprisonment for every day. The maximum penalty under any count by way of
the court might consider the defendant liable on different counts.
the defendant is liable under the different counts as well as separately
with reference to each count, and see People v. Smith, 127
127, 128, and People v. Smith, 127, 128.
There were two witnesses who were the source of an indictment
charge separate and distinct offenses. That is not the case here.
In the country, in this case there were counts charged only one
offense, namely, that of conspiracy, and the essence of that crime
is the unlawful combination, and the means used to carry out the
object of the combination. The indictment charges a single crime,
in the separate counts and commences the different means used to
attain the unlawful purpose. The same offense necessarily, however,
was declared in each of the counts. In each case, the defendant may
be entered on a general verdict of guilty provided there is one good
count. It is not as if see People v. Smith, 127, 128, where
one count charged falsely as before and another falsely by under-
statement. Also in People v. Smith, 127, 128, where it was
held proper to join a count for conspiracy to obtain money and prop-
erty by false pretenses with another count charging conspiracy to
obtain the same money and property by means of the confidence game,
although the judgment was reversed for other reasons. In consid-
ering the fact of the offense in the unlawful combination, and it is
not necessary to set out in detail in the indictment the means by
which it was intended to be accomplished and illegal purpose. See
People v. Zimmerman, 271 Ill. 120; The People v. Schneider, 248
Ill. 120.
This court has said several times the indictment charges
only one conspiracy, namely, the one to defraud a municipality.

namely, the County of Cook, and the judgment inflicted a punishment prescribed for that particular offense. It is alleged that the indictment was defective, in that it does not appear anywhere whether or not the taxes lawfully became due, or that the lower valuations of the tracts of real estate were not found to be correct, or that the alterations were knowingly made, or that defendant was a member of the board of commissioners or any agent or employee of the same. Also, it is said that it does not appear from any allegation in the indictment that the taxes for the year 1928 had not been paid, or whether the property mentioned therein was exempt from taxation, or what the figures alleged to be altered were at first and what figures were substituted by defendant and others. It is said that for these reasons the indictment failed to inform the accused of the nature and cause of the accusation against him, and McSair v. The People, 89 Ill. 442, and Maloney v. The People, 229 Ill. 506, are cited.

The indictment states an offense, and there was no motion to quash it, therefore all technical objections were waived. The People v. Glassberg, 326 Ill. 379. The indictment was sufficiently specific to apprise defendant of the exact charge upon which he was to be tried. It was not necessary to give such specific description of the means used as would be required in a case of an indictment for felony. The People v. Lloyd, 304 Ill. 23; The People v. Esfeldt, 312 Ill. 441. This is not a case where the indictment wholly failed to charge an offense as in The People v. Klawanski, 218 Ill. 481, and The People v. Buffa, 318 Ill. 380, upon which defendant relies.

It is finally urged in behalf of defendant that that part of the judgment which orders him to be committed to the county jail in default of the payment of a fine of \$1000 and to be confined in the jail until the fine is paid, is indefinite, uncertain, incomplete and unauthorized by law. Section 13, division 14 of the Criminal Code

...the County of Cook, and the defendant testified a commitment
...for that particular offense. It is alleged that the in-
...in that it was not apparent anywhere whether
...on that the same lawfully became him, or that the lower relations
...of the facts of your estate were not found to be correct, or that
...the allegations were knowingly made, or that defendant was a member
...of the board of commissioners or any agent or employee of the same.
...Also, it is said that it was not proper type any allegation in
...the indictment that the same for the year 1933 had not been paid,
...at Chicago. The defendant testified that he was never there
...or that the figures alleged to be alleged were at times and that
...figures were submitted by defendant and others. It is said that
...for these reasons the indictment failed to inform the accused of
...the nature and cause of the commission against him, and People v.
The People, No. 111, 441, and People v. The People, No. 111, 441,
...and cited.
...The indictment states an offense, and there was no motion
...to quash it, therefore all technical objections were waived. The
People v. The People, No. 111, 441. The indictment was sufficiently
...specific to specify defendant of the exact charge upon which he was
...to be tried. It was not necessary to give such specific recitation
...of the words used as would be required in a case of an indictment.
...for example, The People v. The People, No. 111, 441 and The People v. The People,
No. 111, 441. This is not a case where the indictment really varies
...to charge an offense as in The People v. The People, No. 111, 441,
...and The People v. The People, No. 111, 441, where the indictment varied.
...It is finally urged in support of defendant that that was
...at the instant which appears to be committed in the county jail
...in default of the payment of a fine of \$1000 and to be confined in
...the jail until the fine is paid, is indelicate, unwarranted, unnecessary
...and unauthorized by law. Section 15, Chapter 11, of the Criminal Code

(see Cahill's Ill. Rev. Stats. 1931, sec. 13, par. 786, chap. 38, p. 1093) provides:

"When a fine is inflicted, the court may order, as a part of the judgment, that the offender be committed to jail, there to remain until the fine and costs are fully paid or he is discharged according to law."

This section was held constitutional in Kennedy v. The People, 122 Ill. 649. Section 17 of the same code provides in substance that whenever it shall be made satisfactorily to appear to the court, after all legal means have been exhausted, that any person who is confined in jail for any fine or costs of prosecution, for any criminal offense, has no estate wherewith to pay such fine and costs, or costs only, it shall be the duty of the court to discharge such person from further imprisonment for such fine and costs, which discharge shall operate as a complete release of the fine and costs, provided that nothing therein shall authorize any person to be discharged from imprisonment before the expiration of the time for which he may be sentenced to be imprisoned, as part of his punishment.

Section 16 of division 14 of the same code provides in substance that if the person convicted, together with one or more sufficient sureties, will acknowledge a judgment in favor of the People of the State of Illinois, for the amount of the fine and costs, or the costs only, when no fine is imposed, the court shall cause the same to be entered in full satisfaction of the fine and costs, or costs only, with a direction that if the judgment is not paid within five months from the time of entering the same, execution shall be issued thereon, and defendant shall, upon the entering of such judgment, be discharged from imprisonment on account of such fine and costs, but that he shall not thereby be discharged from any imprisonment which is made a part of his punishment, not dependent upon the payment of the fine or costs; that if the judgment so entered is not paid within five months from the entry it may be en-

forced by execution, in the same manner as other judgments at law.

Defendant contends that through the failure of the court to order as part of the judgment that defendant might be "discharged according to law," he is deprived of the benefit of the law as provided in sections 16 and 17, and cites Billingsley v. The People, 86 Ill. App. 233, where it was held that an order committing a defendant to jail for contempt in refusing to obey a decree of the court, which did not give defendant the right to purge himself of the contempt by obeying the decree and did not contain any provision limiting his imprisonment to such time as he might be "discharged according to law" was erroneous.

In The People v. Pirfenbrink, 96 Ill. 68, which was also a case where a judgment committing for contempt was reviewed, the Supreme court held that a provision of the order that defendant should be confined until the further order of the court was void as being in effect imprisonment at the pleasure of the court. In Hamilton v. State, 78 Ohio State 76, 84 S. E. 601, a defendant was sentenced for the violation of a law which provided that a court might in its discretion order the person convicted to stand committed to the workhouse until the fine and costs of prosecution were either paid "or until he be discharged therefrom by allowing a credit of sixty cents per day on such fine and costs for each day of confinement in such workhouse, or be otherwise legally discharged." The reviewing court there held that the conditions of the release being thus clearly expressed in the statute, they became and were a necessary part of every proper sentence imposed thereunder, and that while their omission will not necessarily render the sentence wholly void if any part of the punishment imposed was authorized by law, it nevertheless made such sentence incomplete and erroneous. To the contention that the error was not prejudicial the court answered that a sentence of imprisonment in a criminal case must, in and of

forced by necessity, in the same manner as other judgments in law.
Notwithstanding the fact that the judgment of the court is
given as part of the judgment that defendant might be "discharged
according to law," he is directed of the parties of the law as pro-
vided in sections 18 and 19, and other Mississippi v. Johnson,
36 Ill. App. 232, where it was held that an order committing a de-
fendant to jail for contempt is retained in effect a failure of the
court, which did not give defendant the right to purge himself of
the contempt by paying the costs and did not constitute any violation
involving his imprisonment in such time as he might be "discharged
according to law" was erroneous.

In the People v. Birmingham, 36 Ill. 23, which was also a
case where a judgment committing for contempt was reversed, the
S supreme court held that a provision of the order that defendant
should be confined until the further order of the court was void as
being in effect imprisonment at the pleasure of the court. In
Hamilton v. State, 76 Ohio State 70, 41 O. 2d 211, a defendant was
sentenced for the violation of a law which provided that a court
might in its discretion order the person convicted to stand commit-
ted to the workhouse until the time and date of presentation were
either paid "or until he be discharged otherwise by allowing a
series of sixty cents per day on each fine and costs for each day
of confinement in such workhouse, or be otherwise legally discharged."
The reviewing court there held that the condition of the release
being thus closely expressed in the statute, they became and were a
necessary part of every proper sentence imposing imprisonment, and that
while their inclusion will not necessarily render the sentence wholly
void if any part of the confinement imposed was sustained by law, it
nevertheless made such sentence invalid and erroneous. In the
conclusion that the error was not prejudicial the court
held a sentence of imprisonment in a criminal case void, in and of

itself, be definite and complete in all its material terms and so certain and accurate as to the time of its commencement and proper termination that it should not be necessary for either the prisoner or the officers charged with its execution to apply to a court to ascertain its meaning. Said the court: "In other words, to borrow the language of Morris, J., in re Meigs, 14 U. C. R., 244, 'a man who is compelled to have a law suit to get into jail, ought not, by reason of the uncertainty of his sentence, be compelled to have another law suit to get out.'" The judgment was reversed and the cause remanded for re-sentence according to the law.

In Howard v. The People, 3 Mich. 203, where a statute prescribed as the penalty for an offense, a fine or imprisonment for a limited time, or both, the court held that a judgment that the defendant pay a fine and stand committed until it was paid, was void as adjudging an indefinite term of imprisonment. The court said that the trial court could fine or imprison, or within its discretion do both within the limits fixed by the statute, but that he could not imprison for an indefinite time; that the period must be determined and fixed by him judicially.

The People cite Ex Parte Hollig, 31 Ill. 33, Berkenfield v. The People, 191 Ill. 272, and Kettles v. The People, 221 Ill. 321, but an examination of these cases discloses that in each one of them the judgment of the court contained the proviso in substance as stated in paragraph 14, division 14, of the Criminal Code. They also cite and rely on The People v. Jaraslewski, 254 Ill. 299. An examination of that case discloses that Jaraslewski was found guilty of obtaining money under false pretenses, and his punishment was fixed by the court at imprisonment for one year in the house of correction and a fine of \$500 with judgment for costs. After he had served a year in the house of correction he filed a petition in

itself, be satisfied and complete in all its material terms and so
certain and accurate as to the line of its commencement and proper
termination that it should not be necessary for either the plaintiff
or the defendant charged with the execution to apply to a court to
ascertain the meaning. Said the court: "In other words, the language
the language at issue, to be satisfied, is a condition, a term, a condition
who is compelled to have a law suit to get into jail, could not, by
reason of the uncertainty of his sentence, be compelled to have
another law suit to get out." The judgment was reversed and the
cause remanded for re-argument according to the law.
In People v. The People, 3 Mich. 440, where a statute pro-
scribed as the penalty for an offense, a fine or imprisonment for a
limited time, or both, the court held that a judgment that the de-
fendant pay a fine and stand committed until it was paid, was void
as it was an indefinite term of imprisonment. The court said
that the law would seem to be implied, or at least the intention
plain to both within the limits fixed by the statute, but that no
could not require for an indefinite time; and the period must be
definite and fixed by the law itself.
The People v. The People, 11 Ill. 44, 1844, 11 Ill. 44, 1844.
The People, 101 Ill. 44, 1874, and People v. The People, 101 Ill. 44,
but an examination of these cases disclosed that in each one of them
the judgment of the court contained the phrase in substance as
stated in paragraph 14, division 12, of the Criminal Code. They
also cite and rely on People v. The People, 101 Ill. 44, 1874.
Examination of these cases disclosed that judgment was found guilty
of obtaining money under false pretenses, and the judgment was
fixed by the court as imprisonment for one year in the House of
Correction and a fine of \$500 with payment for work. When it
had served a year in the House of Correction he filed a petition in

the Circuit court for discharge from that portion of the judgment which required him to work out the fine and costs. The prayer of this petition having been denied, he sued out a writ of habeas corpus from the Circuit court and upon the hearing was remanded to the custody of the superintendent of the house of correction. He then sued out a writ of error for the purpose of obtaining a review of the judgment of conviction and also the judgment of the court in refusing his discharge. The judgment, in addition to imposing a sentence of one year in the county jail, adjudged that defendant should be fined \$500 and costs and farther: "In case of the neglect or refusal of the defendant, Karl Jaraslewski, to pay said fine and costs, it is ordered that at the expiration of one year aforesaid said defendant be required to work out said fine and costs, as provided by statute * * * in the house of correction at the rate of \$1.50 per day." Defendant's petition for discharge set up that he had no money to pay the fine and costs; that he was wholly destitute and was a pauper within the meaning of the statute, and that all legal means had been exhausted to collect the same. The trial court held that paragraph 455 of the Criminal Code did not apply to the case where the defendant was required to work out his fine in accordance with paragraph 168b of the Criminal Code, and this ruling was assigned as error. The Supreme court said that the question thus raised had been determined adversely to the contention of defendant in the case of Berkenfield v. The People, 191 Ill. 372; that the Criminal Code provided that any person convicted of petit larceny or any misdemeanor punishable under the laws of the State, in whole or in part, by fine, might be required, by the order of the court, to work out such fine and all costs in the workhouse of the city, town, etc., at the rate of \$1.50 per day; that under this section of the statute the court had power to sentence the defendant to imprisonment in the workhouse and also to impose upon him a fine,

the Circuit Court for discharge from that portion of the judgment which required him to work out the time and costs. The prayer of this petition having been denied, he went out a writ of Habeas Corpus from the Circuit Court and upon the hearing was remanded to the custody of the superintendent at the house of correction. He then went out a writ of error for the purpose of obtaining a review of the judgment of conviction and also the judgment of the court in refusing his discharge. The judgment, in refusing to discharge sentences of one year in the county jail, adjudged that defendant should be fined \$500 and costs and further: "In case of his neglect or refusal of the defendant, Karl Lachowski, to pay said fine and costs, it is ordered that on the expiration of one year after said date defendant be required to work out said time and costs, as provided by statute * * * in the house of correction at the rate of \$1.50 per day." Defendant's petition for discharge set up that he had no money to pay the fine and costs; that he was wholly destitute and was a pauper within the meaning of the statute, and that all legal means had been exhausted to collect the same. The trial court said that paragraph 455 of the Criminal Code did not apply to the case where the defendant was required to work out his time in accordance with paragraph 455 of the Criminal Code, and this ruling was sustained as error. The Supreme Court said that the question then raised had been determined adversely to the contention of defendant in the case of Reichelsfeld v. The People, 191 Ill. 478; that the Criminal Code provided that any person convicted of petit larceny or any misdemeanor punishable under the laws of the State, in whole or in part, by fine, might be required, by the order of the court, to work out each time and all costs in the workhouse of the city, town, etc., at the rate of \$1.50 per day; that under this section of the statute the court had power to sentence the defendant to imprisonment in the workhouse and also to impose upon him a fine,

and to provide in the judgment that in case the fine was not paid it should be worked out in the workhouse at the rate of \$1.50 per day. The Court further said that defendant was not entitled to be discharged as a pauper; that paragraph 168b, which authorized the court in proper cases to require that a fine be worked out by the defendant at \$1.50 per day, "was enacted for the purpose of enabling the State to collect in labor fines that could not be collected by execution, and it may apply to a case where the defendant is unable to pay in money as well as to a case where he is able to pay but unwilling to do so." The court also said: "As long as the prisoner is able to pay his fine in labor it cannot be said that 'all legal means' of collecting the fine have been exhausted, where the judgment requires the fine to be paid in labor." The court concluded: "A prisoner is not entitled to his discharge, under paragraph 455, where the judgment requires him to pay the fine in labor, merely by showing that he is a pauper and has no money with which to pay the fine."

There is no provision in the judgment entered in this case requiring that the fine shall be paid in work, and the decision in the Jaraslewski case is therefore not applicable. We think, in order that the judgment of the court may be accurate, plain and certain, it should contain the provision in paragraph 14, division 14, of the Criminal Code, and that defendant is entitled to have the cause remanded in order that a definite sentence may be imposed.

The judgment is therefore reversed and the cause remanded to the Criminal court of Cook county with leave to the State's Attorney of said County to move for, and directions to the court to enter, a proper judgment on the finding in conformity with said section 13, division 14, of the Criminal Code, consistent with the views expressed in this opinion. People v. Boer, 262 Ill. 152.

REVERSED AND REMANDED WITH DIRECTIONS.

McSurely, P. J., and O'Connor, J., concur.

36445

JOSEPH B. KOVARIK,
Appellee,

vs.

THE HOME INSURANCE COMPANY,
NEW YORK, a Corporation,
Appellant.

37
APPEAL FROM MUNICIPAL COURT
OF CHICAGO.

270 I.A. 619²

MR. JUSTICE MATCHETT DELIVERED THE OPINION OF THE COURT.

The Home Insurance Company, defendant in the trial court, has appealed from a judgment in the sum of \$350 entered upon the finding of the court in an action upon an insurance policy. The policy covered loss by theft, robbery or pilferage of one Ford Tudor automobile, 1931 model, the property of plaintiff. The policy was issued June 10, 1931, and was for a term of one year from the date of the policy.

It was stipulated by the parties upon the trial that defendant issued the policy; that while the policy was in force the automobile was stolen, and that if plaintiff was entitled to recover at all the damages should be assessed at \$350. Defendant, however, denied all liability for reasons hereinafter explained. There was a trial by the court and a finding and judgment for plaintiff for \$350, which defendant asks us to reverse.

While conceding the theft of the automobile on May 14, 1932, defendant contends that it is not liable for two reasons, (first) because under the express provisions of the policy it was agreed that (except as otherwise provided by the agreement in writing added thereto and except as to any lien, mortgage or other encumbrance specifically set forth and described in Paragraph B of the policy) the company should not be liable for loss or damage to any property insured thereunder while the same was subject to any lien, mortgage or other encumbrance, and (except as to any lien, mortgage or other encumbrance specifically set forth and described in

Paragraph B of the policy) the entire policy should be void, (unless otherwise provided by agreement in writing added thereto) if the interest of the assured in the subject of the insurance should become other than unconditional and sole lawful ownership. Defendant contends that contrary to this provision of the policy, plaintiff, after the policy was issued, executed two chattel mortgages which were liens against the property insured. One of these was a chattel mortgage (a photostatic copy of which was introduced in evidence) purporting to have been executed April 16, 1932, and showing it had been filed for record in the Recorder's Office of Cook county April 25, 1932. It purported to convey the automobile to one Alex Dembrowski to secure a judgment note described for the sum of \$300. The note, however, was not introduced in evidence and plaintiff testified (and his evidence is uncontradicted) to the effect that the mortgage itself was in his possession. He also testified that he did not receive any consideration for the mortgage, and it is stated in his brief that the mortgage was in fact cancelled, although the statement is not entirely justified by the evidence in the record. There was no explanation as to why the mortgage was given.

The evidence offered by the parties on this point is not so clear and specific as it should be, but upon the whole we think the proof fails to establish that this chattel mortgage was at the time of the loss, or ever, a valid subsisting lien against the assured property. Unless it was such valid and subsisting lien, the insurance policy was not thereby invalidated. Fuller v. Maryland Ins. Co., 254 Ill. App. 248; Cone v. Century Fire Ins. Co., 139 Iowa, 205. Defendant also contends that the insurance policy was rendered void by the execution on April 19, 1932, of a chattel mortgage to Lewis E. Bower to secure a loan of \$127.10. Defendant contends that the execution of this mortgage violated the conditions

Paragraph 3 of the policy (the entire policy should be void, unless otherwise provided by agreement in writing upon maturity) in the interest of the assured in the subject of the insurance should not come other than unconditionally and sole legal ownership. Defendant contends that contrary to this provision of the policy, plaintiff, after the policy was issued, executed two master mortgages which were filed against the property insured. One of these was a chattel mortgage (a photostatic copy of which was introduced in evidence) purporting to have been executed April 12, 1932, and showed it had been filed for record in the Recorder's Office of Cook County April 22, 1932. It purported to convey the automobile to one Alex Thompson, to secure a loan of \$1000.00. The same day of 1932. The note, however, was not introduced in evidence and plaintiff testified (and his evidence is uncontradicted) to the effect that the mortgage itself was by his wife. He also testified that he did not receive any consideration for the note, and it is stated in his brief that the mortgage was in fact executed, although the statement is not entirely justified by the evidence in the record. There was no explanation as to why the mortgage was given.

The evidence offered by the parties on this point is not as clear and specific as it should be, but upon the whole we think the facts are established that this chattel mortgage was in fact one of the loans, or over, a valid subsisting loan against the insured property. Unless it was such valid and subsisting loan, the insurance policy was not properly invalidated. Plaintiff's brief states that the policy was void, but defendant also contends that the insurance policy was voided by the execution on April 12, 1932, of a chattel mortgage to James E. Kover to secure a loan of \$1000.00. Defendant contends that the mortgage of this mortgage violated the conditions

and covenants of the policy and rendered it invalid on the authority of Crikelair v. Citizens Ins. Co., 168 Ill. 369, and the numerous cases which follow the law as there stated.

We are constrained to hold, however, that the obligations of the policy cannot be avoided by reason of the execution of this mortgage. It appears from an examination of the policy that at the time of delivery the policy was subject to a lien in favor of the Universal Credit Company for the sum of \$432; that the actual cost of the automobile to the insured was \$562.30, and that the automobile was fully paid for by the assured and was not mortgaged or otherwise encumbered except by the lien of the Universal Credit Company for this sum of \$432. The insurance company therefore took the risk with knowledge of this lien and assented to it. The evidence shows that by April 19, 1938, the indebtedness of plaintiff secured by this lien had been decreased by payments made to a balance of \$108, which was then due. On that date Bower loaned that amount to plaintiff and issued his check payable to the Universal Credit company. The check was cashed by that corporation on April 25th and the Credit company then issued a conditional sales contract evidencing its lien to Bower. In other words, the chattel mortgage to Bower simply represents the balance of an unpaid lien which existed against the automobile at the time the Insurance company took the risk. It would be unreasonable to hold that such encumbrance would preclude a recovery in case of loss, and such holding would be contrary to the intention of the parties as manifested by the insurance contract. No case has been cited which holds an insurance contract to be invalid under similar circumstances, and the contrary has been held in well-considered cases. Konkland v. Home Mutual Ins. Co., 31 Cre. 321, 49 Pac. 864; Laughinghouse v. Great Nat'l Ins. Co., 200 E. C. 434, 157 S.E.131;

and contents of the bill, and whether it is valid or not.
The insurance company which issued the bill is not
We are concerned as to the validity of the bill, however, and the obligation
of the policy cannot be avoided by reason of the expiration of this
mortgage. It appears from an examination of the policy that at
the time of delivery the policy was subject to a lien in favor
of the Universal Credit Company for the sum of \$4500; that the
actual cost of the automobile to the insured was \$3882.50, and that
the automobile was held for by the insured and was not mort-
gaged or otherwise encumbered except by the lien of the Universal
Credit Company for this sum of \$4500. The insurance company there-
fore took the view that knowledge of this lien was essential to it.
The evidence shows that by April 15, 1911, the indebtedness to
Universal Credit Company by this lien had been decreased by payments made
to a balance of \$1100, which was then due. On that date however
insured that amount to Universal Credit Company and insured his check payable to
the Universal Credit Company. The check was cashed by that com-
pany on April 15th and the Credit Company then issued a credit
for the amount of \$1100, which was then due. In other words,
the credit balance covered evidence of the lien to the credit of the
insured. The mortgage is now simply representative of the balance of the
unpaid lien which existed against the automobile at the time the
insurance company took the risk. It would be unreasonable to hold
that such encumbrance would provide a recovery in case of loss,
and such holding would be contrary to the intention of the parties
as manifested by the insurance contract. No case has been cited
which holds an insurance contract to be invalid under similar
circumstances, and the industry has been held to be validly
valid. Insurance Co. v. Home Mutual Ins. Co., 11 Cal. 2d 100, 101, 102, 103.
Insurance Co. v. Home Mutual Ins. Co., 11 Cal. 2d 100, 101, 102, 103.

State Central Savings Bank v. St. Paul Fire Ins. Co., 184 Iowa, 290.

We hold the policy was not invalidated by reason of the execution of this mortgage.

The second contention of defendant is that the policy was rendered invalid by violation of a provision therein to the effect that no recovery could be had under it if at the time the loss occurred there was any other insurance against the property, whether such insurance was valid or collectible or not, which would attach if the insurance provided for in the policy had not been effected. The uncontradicted evidence shows that Bower at the time of obtaining the chattel mortgage took out insurance on his interest in the automobile, payable to himself and the Atlas Securities Company to the amount of \$100. Defendant contends this violated the provision against double insurance. We hold it did not invalidate the policy since in order to constitute double insurance the two policies must be not only for the benefit of the same persons and on the same subject but also on the same entire risk. Westchester Fire Ins. Co. v. Foster, 90 Ill. 121. See also Browne v. Franklin Fire Ins. Co., 32 S. E. (2nd) 977; Smith v. Northern Ins. Co., 250 N.Y.E. 530, 232 App. Div. 354.

The facts disclosed by this record show the judgment is just, and it is affirmed.

AFFIRMED.

McSurely, P. J., and O'Connor, J., concur.

[illegible]

36456

THE TOBEY FURNITURE COMPANY,
a Corporation,
Plaintiff in Error,

vs.

EDWARD H. AHRENS,
Defendant in Error.

ERROR TO MUNICIPAL COURT
OF CHICAGO.

270 I.A. 619³

MR. JUSTICE MATCHETT DELIVERED THE OPINION OF THE COURT.

On July 27, 1932, plaintiff, who is plaintiff in error in this court, recovered a judgment by confession against defendant Ahrens in the Municipal court of Chicago for \$127.62. On August 8, 1932, defendant moved to vacate the judgment and in support of his motion submitted an affidavit in which he averred his belief that he had a good defense upon the merits to the whole claim, and that he had paid the amount due under the terms of a written contract entered into between plaintiff and defendant on November 10, 1930, at which time plaintiff presented to defendant a statement of account. The motion was allowed. The cause was tried by the court, and at the close of all the evidence the court found the issues for defendant and entered a judgment against plaintiff for costs. That judgment plaintiff seeks to have reversed.

The statement of claim averred a balance due amounting to \$95 with interest from November 10, 1930, upon an alleged promissory note, which is attached to the statement of claim and which described itself as a "conditional sale agreement." It is under seal and contains a power to confess judgment. Plaintiff is described therein as the seller and defendant as the buyer of certain goods described in detail "for the price of Two thousand seven hundred twelve and 28/100 Dollars (\$2712.28), payable at 200 North Michigan avenue, Illinois, in installments as follows: Eleven hundred forty-five & no 100/100 Dollars (\$1145.00), on

THE UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

vs.

EDWARD A. BRENNAN,
Defendant.

STATE OF NEW YORK
BY COUNSEL

280 L.A. 619

1. JUDICIAL NOTICE IS TAKEN OF THE FACTS

On July 27, 1952, Plaintiff, who is plaintiff in error in

this court, received a judgment by confession against defendant

in the Municipal Court of Chicago for \$100.00. On August

2, 1952, defendant moved to vacate the judgment and in support of

his motion submitted an affidavit in which he averred that while

that he had a good defense upon the merits in the whole case, and

that he had paid the amount due under the terms of a written con-

tract entered into between himself and defendant on November 10,

1951, at which time plaintiff presented in defendant a statement

of account. The motion was allowed. The case was tried by the

court, and at the close of all the evidence the court found the

issues for defendant and entered a judgment against plaintiff for

costs. That judgment plaintiff seeks to have reversed.

The statement of claim averred a balance due amounting to

\$100 with interest from November 10, 1951, upon an alleged promi-

sory note, which is attached to the statement of claim and which

described itself as a "conditional sale agreement." It is unwar-

rant and contains a power to confess judgment. Plaintiff is

described therein as the seller and defendant as the buyer of

certain goods described in detail "for the price of two thousand

seven hundred twelve and 00/100 Dollars (\$2,712.00), payable as

per the attached invoice, Illinois, as provided in the contract

State District Court - Case No. 100-441111-100-441111-100-441111

the date hereof, and One hundred thirty & 60/100--Dollars (\$130.60) on the 10th day of every month thereafter until the entire price shall have been paid, said purchase price to bear interest from the date hereof upon the balance thereof remaining from time to time unpaid at the rate of 6 per cent per annum after maturity, payable monthly."

Upon the trial this document was offered in evidence by plaintiff and received without objection. Defendant then offered in evidence twelve checks payable to the order of plaintiff, indicating payments received after November 10, 1930, for the total amount of \$1567.28. Attached to the bill of exceptions by the agreement of the parties are defendant's exhibits 13 and 14, exhibit 13 being an itemized bill rendered by plaintiff to defendant under date of November 10, 1930, showing a cash credit of \$1145 on the account and a balance due of \$1567.28, and exhibit 14 showing the same statement of account rendered by plaintiff to defendant on December 1, 1930, for the same balance. Defendant testified that by check dated September 15, 1930, he paid \$1000 of this \$1145 item and that he had made some cash payments, the dates of which he could not recall. Plaintiff then produced its credit manager, who testified that he was familiar with the account of defendant, and that the full sum of \$1145 named in the sales contract as to be paid November 10, 1930, had not been paid. An objection was sustained. Thereupon, plaintiff offered to prove by this witness that the item of \$1145, shown on the note or sales contract, and which by the terms of the contract was to be paid November 10th, had been paid to the extent of \$1050 and that the balance of \$95 had never been paid. Plaintiff also offered to show by this witness that through an error the account of defendant had been credited with \$95, which as a matter of fact had been received from another customer, and that upon

ascertaining the error plaintiff immediately informed defendant thereof and charged his account with the amount of \$95. Letters sent to defendant explaining this mistake in the account were offered in evidence, but, upon objection made by defendant, were excluded upon the theory that "everything previous to that contract is merged in the contract." The trial Judge stated he thought that the rule would be different if the account had been running independent of some particular contract.

We think the court erred in excluding this evidence. It is elementary, of course, that the burden of proving payment was upon defendant who pleaded it. To this point plaintiff cites Evans v. Pease Construction Co., 142 Ill. App. 375, and Greenman Bros. Mfg. Co. v. Nelson, 191 Ill. App. 494, which sustain it.

It was proper for plaintiff to show by parol evidence that in the settlement of its accounts with defendant an item had been omitted by inadvertence or mistake, even though the settlement was evidenced by a written agreement. Kuck v. Fulis, 98 Ill. App. 134. It is true, as defendant points out, that in the last named case the judgment for defendant was affirmed, but the evidence there had been admitted and the issue found for defendant. Here, the evidence was excluded, and this was error. It was admissible for two reasons, first, for the purpose of showing the actual consideration for the conditional contract, and second, in order to show the mistake in computation upon the settlement of the accounts between the parties. As a matter of fact, the written document does not acknowledge the receipt of the \$1145 or any other sum.

For the error in sustaining the objection to this evidence the judgment is reversed and the cause remanded for another trial.

REVERSED AND REMANDED.

McSurely, P. J., and O'Connor, J., concur.

concerning the story plaintiff immediately informed defendant
thereby not changing the nature of the matter at all. Plaintiff
went to defendant explaining this matter to the account and al-
though in witness, but, upon objection made by defendant, was
excluded upon the theory that "everything provided to that witness
is wrong in the witness." The trial judge stated on several times
that this would be sufficient to the amount and upon several other
points of some particular concern.
To show the facts were in substance this witness. It
is necessary, of course, that the nature of several matters was
upon defendant who placed it. To this point plaintiff also
State v. John Thompson, 100 Ill. 2d 111, 112, 113, 114, 115, 116, 117, 118, 119, 120, 121, 122, 123, 124, 125, 126, 127, 128, 129, 130, 131, 132, 133, 134, 135, 136, 137, 138, 139, 140, 141, 142, 143, 144, 145, 146, 147, 148, 149, 150, 151, 152, 153, 154, 155, 156, 157, 158, 159, 160, 161, 162, 163, 164, 165, 166, 167, 168, 169, 170, 171, 172, 173, 174, 175, 176, 177, 178, 179, 180, 181, 182, 183, 184, 185, 186, 187, 188, 189, 190, 191, 192, 193, 194, 195, 196, 197, 198, 199, 200, 201, 202, 203, 204, 205, 206, 207, 208, 209, 210, 211, 212, 213, 214, 215, 216, 217, 218, 219, 220, 221, 222, 223, 224, 225, 226, 227, 228, 229, 230, 231, 232, 233, 234, 235, 236, 237, 238, 239, 240, 241, 242, 243, 244, 245, 246, 247, 248, 249, 250, 251, 252, 253, 254, 255, 256, 257, 258, 259, 260, 261, 262, 263, 264, 265, 266, 267, 268, 269, 270, 271, 272, 273, 274, 275, 276, 277, 278, 279, 280, 281, 282, 283, 284, 285, 286, 287, 288, 289, 290, 291, 292, 293, 294, 295, 296, 297, 298, 299, 300, 301, 302, 303, 304, 305, 306, 307, 308, 309, 310, 311, 312, 313, 314, 315, 316, 317, 318, 319, 320, 321, 322, 323, 324, 325, 326, 327, 328, 329, 330, 331, 332, 333, 334, 335, 336, 337, 338, 339, 340, 341, 342, 343, 344, 345, 346, 347, 348, 349, 350, 351, 352, 353, 354, 355, 356, 357, 358, 359, 360, 361, 362, 363, 364, 365, 366, 367, 368, 369, 370, 371, 372, 373, 374, 375, 376, 377, 378, 379, 380, 381, 382, 383, 384, 385, 386, 387, 388, 389, 390, 391, 392, 393, 394, 395, 396, 397, 398, 399, 400, 401, 402, 403, 404, 405, 406, 407, 408, 409, 410, 411, 412, 413, 414, 415, 416, 417, 418, 419, 420, 421, 422, 423, 424, 425, 426, 427, 428, 429, 430, 431, 432, 433, 434, 435, 436, 437, 438, 439, 440, 441, 442, 443, 444, 445, 446, 447, 448, 449, 450, 451, 452, 453, 454, 455, 456, 457, 458, 459, 460, 461, 462, 463, 464, 465, 466, 467, 468, 469, 470, 471, 472, 473, 474, 475, 476, 477, 478, 479, 480, 481, 482, 483, 484, 485, 486, 487, 488, 489, 490, 491, 492, 493, 494, 495, 496, 497, 498, 499, 500, 501, 502, 503, 504, 505, 506, 507, 508, 509, 510, 511, 512, 513, 514, 515, 516, 517, 518, 519, 520, 521, 522, 523, 524, 525, 526, 527, 528, 529, 530, 531, 532, 533, 534, 535, 536, 537, 538, 539, 540, 541, 542, 543, 544, 545, 546, 547, 548, 549, 550, 551, 552, 553, 554, 555, 556, 557, 558, 559, 560, 561, 562, 563, 564, 565, 566, 567, 568, 569, 570, 571, 572, 573, 574, 575, 576, 577, 578, 579, 580, 581, 582, 583, 584, 585, 586, 587, 588, 589, 590, 591, 592, 593, 594, 595, 596, 597, 598, 599, 600, 601, 602, 603, 604, 605, 606, 607, 608, 609, 610, 611, 612, 613, 614, 615, 616, 617, 618, 619, 620, 621, 622, 623, 624, 625, 626, 627, 628, 629, 630, 631, 632, 633, 634, 635, 636, 637, 638, 639, 640, 641, 642, 643, 644, 645, 646, 647, 648, 649, 650, 651, 652, 653, 654, 655, 656, 657, 658, 659, 660, 661, 662, 663, 664, 665, 666, 667, 668, 669, 670, 671, 672, 673, 674, 675, 676, 677, 678, 679, 680, 681, 682, 683, 684, 685, 686, 687, 688, 689, 690, 691, 692, 693, 694, 695, 696, 697, 698, 699, 700, 701, 702, 703, 704, 705, 706, 707, 708, 709, 710, 711, 712, 713, 714, 715, 716, 717, 718, 719, 720, 721, 722, 723, 724, 725, 726, 727, 728, 729, 730, 731, 732, 733, 734, 735, 736, 737, 738, 739, 740, 741, 742, 743, 744, 745, 746, 747, 748, 749, 750, 751, 752, 753, 754, 755, 756, 757, 758, 759, 760, 761, 762, 763, 764, 765, 766, 767, 768, 769, 770, 771, 772, 773, 774, 775, 776, 777, 778, 779, 780, 781, 782, 783, 784, 785, 786, 787, 788, 789, 790, 791, 792, 793, 794, 795, 796, 797, 798, 799, 800, 801, 802, 803, 804, 805, 806, 807, 808, 809, 810, 811, 812, 813, 814, 815, 816, 817, 818, 819, 820, 821, 822, 823, 824, 825, 826, 827, 828, 829, 830, 831, 832, 833, 834, 835, 836, 837, 838, 839, 840, 841, 842, 843, 844, 845, 846, 847, 848, 849, 850, 851, 852, 853, 854, 855, 856, 857, 858, 859, 860, 861, 862, 863, 864, 865, 866, 867, 868, 869, 870, 871, 872, 873, 874, 875, 876, 877, 878, 879, 880, 881, 882, 883, 884, 885, 886, 887, 888, 889, 890, 891, 892, 893, 894, 895, 896, 897, 898, 899, 900, 901, 902, 903, 904, 905, 906, 907, 908, 909, 910, 911, 912, 913, 914, 915, 916, 917, 918, 919, 920, 921, 922, 923, 924, 925, 926, 927, 928, 929, 930, 931, 932, 933, 934, 935, 936, 937, 938, 939, 940, 941, 942, 943, 944, 945, 946, 947, 948, 949, 950, 951, 952, 953, 954, 955, 956, 957, 958, 959, 960, 961, 962, 963, 964, 965, 966, 967, 968, 969, 970, 971, 972, 973, 974, 975, 976, 977, 978, 979, 980, 981, 982, 983, 984, 985, 986, 987, 988, 989, 990, 991, 992, 993, 994, 995, 996, 997, 998, 999, 1000

RECEIVED AND FORWARDED

RECEIVED BY THE COURT, 1000

36457

LOUISE SHAHINIEN,
Appellee,

vs.

JOHN SHAHINIEN,
Appellant.

JOHN SHAHINIEN,
Appellant,

vs.

THE PEOPLE OF THE STATE OF ILLINOIS,
Appellee.

APPEAL FROM CIRCUIT COURT
OF COOK COUNTY.

270 I.A. 619⁴

MR. JUSTICE MATCHETT DELIVERED THE OPINION OF THE COURT.

This is an appeal by the respondent, John Shahinien, from an order entered (after hearing upon a rule to show cause) finding that respondent had failed to make sufficient answer to the petition, adjudging that he was in contempt for wilful failure to comply with the order of the court theretofore entered on August 26, 1932, and ordering that he be committed to the common jail of Cook county for a period not to exceed six months until he should purge himself of the contempt by compliance with the order or until released by due process of law.

It is contended in behalf of respondent that his failure to comply with the order of the court was not wilful, and it was therefore error to commit him to jail for contempt; further that the commitment is in violation of section 12 of article 2 of the Constitution of the State; that there is no evidence to sustain the commitment order; that respondent did not receive a fair and impartial hearing, and that the court erred in denying his motion for leave to file his sworn answer to the rule to show cause.

A recitation of the facts as disclosed by the record will clarify. On April 15, 1932, complainant, Louise Shahinien, filed her bill in equity in the Circuit court against the respondent,

THE PEOPLE OF THE STATE OF ILLINOIS,
Respondent.

JOHN W. HARRIS,
Respondent.

vs.

JOHN W. HARRIS,
Respondent.

vs.

THE PEOPLE OF THE STATE OF ILLINOIS,
Respondent.

20127

IN SENATE, JANUARY TWENTY-NINTH, ONE THOUSAND NINETEEN HUNDRED AND SEVEN.

This is an appeal by the respondent, John W. Harris, from an order entered (after hearing upon a writ of habeas corpus) directing that respondent and his wife be committed to the custody of the State of Illinois, and that he be confined in the common jail of Cook County for a period not to exceed six months until he should purge himself of the contempt by compliance with the order or until referred to the Governor of the State.

It is contended in behalf of respondent that his failure to comply with the order of the court was not willful, and is was therefore error to commit him to jail for contempt; further that the commitment is in violation of section 12 of article II of the Constitution of the State; that there is no evidence to sustain the commitment order; that respondent did not receive a fair and impartial hearing, and that the court erred in denying his motion for writ of habeas corpus.

A recitation of the facts as disclosed by the record will clearly, on April 12, 1907, respondent, John W. Harris, filed his bill in equity in the Circuit Court against the respondent,

averring that both had been residents of Illinois for more than two years; that they were married in Chicago September 5, 1930, separated December 29, 1931; that subsequent to the marriage respondent began a course of cruel and inhuman treatment toward complainant, beating her on many occasions, and using vile and abusive language toward her; that at particular times and places named he struck her with his fist and December 29, 1931, ordered her from the house; that he afterward filed a bill for divorce against her which was dismissed for want of equity. The bill averred that the respondent was an able-bodied man, the owner of a grocery store and amply able to support her, but that he left her destitute, and prayed that he might be required to make proper and suitable provision for separate maintenance. This bill was verified.

May 12th thereafter complainant filed a petition for alimony and solicitors' fees, setting up substantially the same facts as alleged in her bill, and this petition was also verified.

On the same day, May 12th, respondent filed an answer to the petition for alimony in which he admitted that he had theretofore filed a suit for divorce against complainant in the Superior court of Cook county on or about January 10, 1932; that pending hearing thereof an order was entered allowing complainant \$10 a week as temporary alimony; and averred that after a partial hearing of the cause in the Superior court on April 8, 1932, the cause was dismissed without prejudice. Respondent denied that he was in receipt of a good income; averred that he was working for his father in a grocery store and received no wages or remuneration except his room and board, and that owing to existing financial conditions his father was unable to pay him any wages, and denied that complainant was destitute. He averred that complainant left him without reason or just cause about December 22, 1931; that there were no children born of said marriage; that complainant left him without

stating that both had been residents of Illinois for more than
two years; that they were married in Chicago December 8, 1930,
separated December 20, 1931; that subsequent to the marriage
respondent began a course of cruel and inhuman treatment toward
complainant, beating her on many occasions, and using vile and
abusive language toward her; that at particular times and places
named he struck her with his fist and December 20, 1931, ordered
her from the house; that he afterward filed a bill for divorce
against her which was dismissed for want of equity. The bill
stating that the respondent was an able-bodied man, the owner of a
property and was well able to support her, but that he left her
helpless, and saying that he ought to be required to make proper and
suitable provision for her and her maintenance. This bill was verified
May 1932 thereafter complainant filed a petition for alimony
and maintenance, later, setting up substantially the same facts as
alleges in her bill, and this petition was also verified.
On the same day, May 1932, respondent filed an answer to
the petition for alimony in which he admitted that he had there-
fore filed a bill for divorce against complainant in the Superior
Court of Cook County on or about January 10, 1932; that pending
hearing thereof he never was advised of said divorce and that
he was temporarily absent and returned home after a partial hearing
of the same in the Superior Court April 8, 1932, and upon the
dismissal without prejudice. Complainant stated that he was in the
habit of a good income; stating that he was working for his living
in a factory where and receiving as wages or remuneration about
\$15.00 per week, and that owing to existing financial conditions
his factory was unable to pay him any more, but stated that now
he is working on West Lake about \$12.00 per week. He stated that
no children born of said marriage; that complainant left him without

cause or provocation on at least five times prior to their final separation December 22, 1931; that complainant was a woman of violent temper and on diverse occasions attacked him with knives and other instruments, calling him vile names and cursing him in the presence of customers; that she was living separate and apart from him without reasonable or just cause and was not entitled to separate maintenance from him.

After hearing the evidence on the petition the court on May 12, 1932, entered an order directing that respondent pay \$10 a week to complainant as temporary alimony, the first payment to be due May 14, 1932, until further order of the court, and that he should pay to her \$50 solicitor's fees, payable \$25 in thirty days and \$25 in sixty days from the date of the order.

May 23, 1932, respondent answered the bill of complaint setting up facts substantially the same as heretofore alleged with reference to his financial condition and as to the conduct of the parties toward each other. The same day respondent filed a petition to vacate the order for temporary alimony theretofore entered, and May 29, 1932, the court, after hearing the evidence in support of this petition, ordered that the order for alimony of May 5, 1932, should be modified to the extent of making the amount of payment \$6 a week, the first payment to be due May 12, 1932.

June 1, 1932, respondent filed a cross-bill against complainant in which he averred that he had at all times treated her with kindness and consideration, but that she had been guilty of extreme and repeated cruelty toward him; that on October 7, 1930, she struck him in the nose with a heavy instrument, causing hemorrhage, on June 3, 1930, again struck him and attacked him with a knife, on December 22, 1931, again struck him in the nose causing bleeding, and in June, 1931, wilfully and maliciously attempted to take his life by stabbing. The cross-bill prayed for divorce and other relief. It was duly verified.

...on or previous to at least five times prior to their final separation December 22, 1932; that complainant was a woman of violent temper and on diverse occasions attacked him with knives and other instruments, calling his name and cursing him in the presence of witnesses; that she was living separately and apart from him without reasonable or just cause and was not entitled to support and maintenance from him.

After hearing the evidence on the petition the court on May 12, 1933, entered an order directing that respondent pay \$10 a week to complainant as temporary alimony, the first payment to be due May 14, 1933, until further order of the court, and that he should pay to her \$50 solicitor's fees, payable \$25 in thirty days and \$25 in sixty days from the date of the order.

May 22, 1933, respondent answered the bill of complaint setting up facts substantially the same as heretofore alleged with reference to his financial condition and as to the conduct of the parties toward each other. The same day respondent filed a petition to vacate the order for temporary alimony heretofore entered, and May 27, 1933, the court, after hearing the evidence in support of this petition, ordered that the order for alimony of May 12, 1933, should be modified to the extent of making the amount of payment for a week, the first payment to be due May 12, 1933.

June 1, 1933, respondent filed a cross-bill against complainant in which he averred that he had at all times treated her with kindness and consideration, but that she had been guilty of extreme and repeated cruelty toward him; that on October 7, 1930, she struck him in the nose with a heavy instrument, causing hemorrhage, on June 5, 1930, again struck him and attacked him with a knife, on December 22, 1931, again struck him in the nose causing bleeding, and in June, 1931, viciously and maliciously attempted to take his life by poisoning. The cross-bill proper for divorce and alimony failed. It was duly verified.

Complainant was given seven days to answer.

August 10, 1932, complainant filed her petition setting up the entry of the order of May 29, 1932, requiring respondent to pay \$6 a week for her support; and averring that respondent had wilfully refused to comply with the order and was then in arrears \$42 for alimony and \$25 for solicitor's fees. She prayed for a rule on him to show cause. The petition was duly verified.

On the same day, August 10th, an order was entered requiring respondent to appear August 16, 1932, and show good cause, if any, why he should not be punished for failure to comply with the order theretofore entered. August 16th the rule was continued until August 23rd, and on August 23rd again continued until August 24th.

August 24th the court entered an order directing that respondent pay complainant on or before August 26, 1932, a substantial payment on the amount of the arrears in temporary alimony, and that he appear in person on August 26, 1932, before the court, and make payment to complainant; that upon his failure to make payment on that date he should be committed to the county jail for contempt of court for failure to comply with the order for temporary alimony.

It appears from the order entered August 26th that due notice and copy of petition for rule to show cause was duly served upon respondent, and that he appeared personally in open court and answered the rule orally. The certificate of evidence discloses that on August 26th the solicitor for respondent asked leave to file an answer, and that this petition was not granted by the court. The court thereupon interrogated complainant, who in response to questions said she was not employed, and that she lived with her mother.

Respondent was duly sworn in his own behalf. He testified that he was 25 years old, came to this country in 1924, left school in 1930, was married September 6, 1930; that he has had no money or income since December, 1931; that he had been living with his father

...the first time that he was ...
August 10, 1933, complainant filed her petition setting up
the date of her birth at age 20, 1913, ...
as a work for her support; and stating that respondent had willfully
refused to comply with the order and was then in arrears for
alimony and for collector's fees. She prayed for a writ on him
to show cause. The petition was duly verified.
On the next day, August 10th, an order was entered requiring
respondent to appear August 10, 1933, and show good cause, if any,
why he should not be punished for failure to comply with the order.
Investigation was made. August 23rd the case was continued until
August 27th, and on August 27th again continued until August 28th.
August 28th the court entered an order directing that the
petitioner pay complainant on or before August 30, 1933, a substantial
payment on the amount of the arrears in temporary alimony, and that
he appear in person on August 30, 1933, before the court, and make
payment to complainant; that upon his failure to make payment on
that date he should be committed to the county jail for contempt of
court. The court is satisfied that the petitioner's petition is
true. It appears from the order entered August 28th that the
petition and copy of petition for rule to show cause was duly served
upon respondent, and that he appeared personally in open court and
contested the rule orally. The excellence of evidence disclosed
that on August 28th the collector for the respondent asked leave to
file an answer, and that this petition was not granted by the court.
The court instructed the jury that the respondent is
guilty as charged and was not excused, and that she lived with her mother.
Respondent was duly sworn in his own behalf. He testified
that he was 25 years old, was in this country in 1931, but stated
in 1930, was married September 8, 1930; that he had no money at
that time since December, 1931; that he had been living with his father

at 1032 Grace street; that the grocery store was bought in April, 1931, by his father. He further testified, "The daily receipts in that store are about \$19 per day, expenses \$5 or \$6, profits on \$19 are \$5 a day. We are selling canned goods and fruits there. I have not paid my father any board; I am just working there, all I am paying is my room and board. I have not drawn any money out of that business, I have had no money in the last six months." Respondent said that he had looked for other work at chain stores and that all he could do was to work in a grocery; that since suit had been started he had not paid any money to his wife; that he did not know of any money that had been paid to her except through his attorney; that he had not paid his attorney any money, and that he was willing to pay whatever the court ordered him to pay as soon as he was in a position to do so.

On cross-examination respondent said that he was not working in the store at the time he was married; that he went to work there in April; that he had not given up his other job but had been discharged; that this store was opened after he was married. He admitted that when the store had been burglarized a few months before the trial he made an affidavit to the effect that he was the owner of the store. When asked, "Did you make a sworn statement with some insurance company in the loop, that you were the owner of that store when you were collecting for a burglary?" he said, "Yes." His solicitor then said, "Your Honor, this has all been gone over before Judge Trade," to which the solicitor for petitioner replied, "That is why he gave us an order." In response to other questions respondent said that he spent about eight hours in the store each day, began to work about nine, sometimes got up at seven; that he lived above the store and spent eight or nine hours a day there.

The father of respondent testified that he owned the grocery store in question, whereupon solicitor for petitioner

The father of respondent testified that he owned the grocery store in question, whereas witness for petitioner as 1938 witness; that the grocery store was bought in April, 1931, by his father. He further testified, "The daily proceeds in that store are about \$15 per day, expenses \$2 or \$3, leaving on his net \$12 a day. We are selling canned goods and fruit there. I have not paid my father any cash; I am just working there, all I am getting is my room and board. I have not drawn any money out of that business, I have had no money in the last six months." Respondent said that he had looked for other work at chain stores and that all he could do was to work in a grocery; that since wife had been started he had not paid any money to his wife; that he did not know of any money that had been paid to her except through his salary; that he had not paid his attorney any money, and that he was willing to pay whatever the court ordered him to pay as soon as he was in a position to do so.

On cross-examination respondent said that he was not working in the store at the time he was arrested; that he went to work there in April; that he had not given up his other job yet had been discharged; that this store was opened after he was married. He admitted that when the store had been purchased a few months before the trial he made an affidavit to the effect that he was the owner of the store. When asked, "Did you make a sworn statement with some licensed lawyer in the shop, that you were the owner of that store when you were collecting for a burglary?" he said, "Yes."

The solicitor then said, "Your Honor, this has all been gone over before Judge Tamm," in which the solicitor for petitioner testified, "That is why he gave us an order." In response to other questions respondent said that he spent about eight weeks in the state penitentiary, going to work most times, sometimes not so at night; that he lived there two days and eight nights in nine days a day later.

The father of respondent testified that he owned the

objected, saying that the witness was being told how to answer the questions, and the court said: "All go back and sit down except the attorney. If the witness doesn't understand the language we will try some other way." The witness, continuing in response to questions by respondent's attorney, said he had paid \$650 for that store, that it brought in \$15, \$16, \$17 and \$19 a day-- \$19 on Saturday. He said that he did not give John (meaning respondent) any money; that he had not given him any, but that John lived with him; that he (witness) paid the rent for the store and the house which was \$85 a month.

The above is a rather full resume' of the evidence offered in response to the rule to show cause. The Chancellor heard and saw the witnesses, and while we recognize the rule invoked in behalf of respondent to the effect that the court should not punish for contempt unless disobedience is wilful (O'Callaghan v. O'Callaghan, 69 Ill. 551; Dinet v. People, 73 Ill. 183; Blake v. People, 80 Ill., 11) we think this record justifies the finding by the Chancellor that respondent's failure to comply with the order of the court was intentional and wilful. It would appear that the question of his interest in the store has been passed upon by two Chancellors who have practically reached the same conclusion. If the failure of respondent to comply with the order was wilful, as we hold it was, there was, of course, no violation of his constitutional rights.

There is also no merit in the contention of respondent that the commitment order is not sustained by the evidence. It is true that respondent was adjudged in contempt on testimony which was given by himself and his father who testified in his behalf. He and his father undertook to testify, and the court rightly, we think, found him guilty on evidence submitted in his own behalf.

stated, saying that the witness was being told how to answer
 the questions, and the court said: "All the back and all down
 except the attorney. If the witness doesn't understand the law-
 yers we will try some other way." The witness, continuing in
 response to questions by respondent's attorney, said he had paid
 \$100 for that store, that it was in his, his, his and his a
 day-- his on Saturday. He said that he did not give him (meaning
 respondent) any money; that he had not given him any, but that
 John lived with him; that he (witness) said the rent for the store
 and the house which was \$88 a month.
 The above is a rather full resume of the evidence offered
 in response to the rule to show cause. The Chancellor heard and
 saw the witnesses, and will be required to rule in favor of
 the party of respondent in the effect that the court should not
 make for himself any special rules in this case. People v. O'Connell,
 10 Ill. 2d 111, 112; People v. O'Connell, 10 Ill. 2d 111, 112; People v. O'Connell,
 10 Ill. 2d 111, 112. We think the record justifies the finding by
 the Chancellor that respondent's failure to comply with the order
 of the court was intentional and willful. It would appear that the
 failure of his father to the state was caused by the
 Chancellor who had previously issued the same order. If
 the failure of respondent to comply with the order was willful, as
 we hold it was, there was, of course, no violation of his constitu-
 tional rights.
 There is also no merit in the contention of respondent that
 the statement made by the witness is not sustained by the evidence. It is true
 that respondent was offered in evidence on certain points which was
 given by himself and his father was recalled in his behalf. He
 and his father understood as readily, and the court rightly, we think,
 found him guilty on evidence submitted in his own behalf.

It is urged that respondent did not receive a fair and impartial hearing; that the Chancellor from the beginning of the hearing was impatient and unfair; that he made sarcastic and contemptuous remarks concerning respondent and was disinclined to hear evidence on the part of respondent. It is true that the Chancellor expressed his opinion quite freely with reference to the conduct of respondent, but the cause was not being heard by a jury, and we are inclined to the opinion that the Chancellor in his remarks merely expressed what any just judge would have thought. Respondent, in our opinion, well deserved to have said the things which were said to him.

It is insisted that the court erred in denying respondent the right to file his sworn answer to the rule to show cause. The rule had expired, and although respondent had been personally present on several occasions with his counsel he had not apparently thought it worth while to file his answer until after the hearing had been begun. His time had expired by reason of his own wilful negligence, and any leave to file when application was made would have been by grace rather than by right. However, the court heard him and his witnesses testify in open court, and as already stated, it would seem that two Chancellors have already gone over substantially the same ground with substantially the same result.

The order entered is, in the opinion of this court, a just and righteous one and it is affirmed.

AFFIRMED.

McSurely, V. J., and O'Connor, J., concur.

It is urged that respondents did not receive a fair and impartial hearing; that the Commission took the testimony of the parties and interested and disinterested persons and made no attempt to investigate the charges and was inclined to believe the charges were true. It is true that the Commission accepted the opinion of the majority of the witnesses in the hearing, but the same was not being heard by a jury, and we are inclined to the opinion that the Commission in its remarks were somewhat biased and that justice would have been done, in our opinion, well deserved to have said the things which were said to him.

It is pointed out that the court is not bound by the decision of the court in the case of *United States v. Smith*, 100 F.2d 100, 101, 102, 103, 104, 105, 106, 107, 108, 109, 110, 111, 112, 113, 114, 115, 116, 117, 118, 119, 120, 121, 122, 123, 124, 125, 126, 127, 128, 129, 130, 131, 132, 133, 134, 135, 136, 137, 138, 139, 140, 141, 142, 143, 144, 145, 146, 147, 148, 149, 150, 151, 152, 153, 154, 155, 156, 157, 158, 159, 160, 161, 162, 163, 164, 165, 166, 167, 168, 169, 170, 171, 172, 173, 174, 175, 176, 177, 178, 179, 180, 181, 182, 183, 184, 185, 186, 187, 188, 189, 190, 191, 192, 193, 194, 195, 196, 197, 198, 199, 200, 201, 202, 203, 204, 205, 206, 207, 208, 209, 210, 211, 212, 213, 214, 215, 216, 217, 218, 219, 220, 221, 222, 223, 224, 225, 226, 227, 228, 229, 230, 231, 232, 233, 234, 235, 236, 237, 238, 239, 240, 241, 242, 243, 244, 245, 246, 247, 248, 249, 250, 251, 252, 253, 254, 255, 256, 257, 258, 259, 260, 261, 262, 263, 264, 265, 266, 267, 268, 269, 270, 271, 272, 273, 274, 275, 276, 277, 278, 279, 280, 281, 282, 283, 284, 285, 286, 287, 288, 289, 290, 291, 292, 293, 294, 295, 296, 297, 298, 299, 300, 301, 302, 303, 304, 305, 306, 307, 308, 309, 310, 311, 312, 313, 314, 315, 316, 317, 318, 319, 320, 321, 322, 323, 324, 325, 326, 327, 328, 329, 330, 331, 332, 333, 334, 335, 336, 337, 338, 339, 340, 341, 342, 343, 344, 345, 346, 347, 348, 349, 350, 351, 352, 353, 354, 355, 356, 357, 358, 359, 360, 361, 362, 363, 364, 365, 366, 367, 368, 369, 370, 371, 372, 373, 374, 375, 376, 377, 378, 379, 380, 381, 382, 383, 384, 385, 386, 387, 388, 389, 390, 391, 392, 393, 394, 395, 396, 397, 398, 399, 400, 401, 402, 403, 404, 405, 406, 407, 408, 409, 410, 411, 412, 413, 414, 415, 416, 417, 418, 419, 420, 421, 422, 423, 424, 425, 426, 427, 428, 429, 430, 431, 432, 433, 434, 435, 436, 437, 438, 439, 440, 441, 442, 443, 444, 445, 446, 447, 448, 449, 450, 451, 452, 453, 454, 455, 456, 457, 458, 459, 460, 461, 462, 463, 464, 465, 466, 467, 468, 469, 470, 471, 472, 473, 474, 475, 476, 477, 478, 479, 480, 481, 482, 483, 484, 485, 486, 487, 488, 489, 490, 491, 492, 493, 494, 495, 496, 497, 498, 499, 500, 501, 502, 503, 504, 505, 506, 507, 508, 509, 510, 511, 512, 513, 514, 515, 516, 517, 518, 519, 520, 521, 522, 523, 524, 525, 526, 527, 528, 529, 530, 531, 532, 533, 534, 535, 536, 537, 538, 539, 540, 541, 542, 543, 544, 545, 546, 547, 548, 549, 550, 551, 552, 553, 554, 555, 556, 557, 558, 559, 560, 561, 562, 563, 564, 565, 566, 567, 568, 569, 570, 571, 572, 573, 574, 575, 576, 577, 578, 579, 580, 581, 582, 583, 584, 585, 586, 587, 588, 589, 590, 591, 592, 593, 594, 595, 596, 597, 598, 599, 600, 601, 602, 603, 604, 605, 606, 607, 608, 609, 610, 611, 612, 613, 614, 615, 616, 617, 618, 619, 620, 621, 622, 623, 624, 625, 626, 627, 628, 629, 630, 631, 632, 633, 634, 635, 636, 637, 638, 639, 640, 641, 642, 643, 644, 645, 646, 647, 648, 649, 650, 651, 652, 653, 654, 655, 656, 657, 658, 659, 660, 661, 662, 663, 664, 665, 666, 667, 668, 669, 670, 671, 672, 673, 674, 675, 676, 677, 678, 679, 680, 681, 682, 683, 684, 685, 686, 687, 688, 689, 690, 691, 692, 693, 694, 695, 696, 697, 698, 699, 700, 701, 702, 703, 704, 705, 706, 707, 708, 709, 710, 711, 712, 713, 714, 715, 716, 717, 718, 719, 720, 721, 722, 723, 724, 725, 726, 727, 728, 729, 730, 731, 732, 733, 734, 735, 736, 737, 738, 739, 740, 741, 742, 743, 744, 745, 746, 747, 748, 749, 750, 751, 752, 753, 754, 755, 756, 757, 758, 759, 760, 761, 762, 763, 764, 765, 766, 767, 768, 769, 770, 771, 772, 773, 774, 775, 776, 777, 778, 779, 780, 781, 782, 783, 784, 785, 786, 787, 788, 789, 790, 791, 792, 793, 794, 795, 796, 797, 798, 799, 800, 801, 802, 803, 804, 805, 806, 807, 808, 809, 810, 811, 812, 813, 814, 815, 816, 817, 818, 819, 820, 821, 822, 823, 824, 825, 826, 827, 828, 829, 830, 831, 832, 833, 834, 835, 836, 837, 838, 839, 840, 841, 842, 843, 844, 845, 846, 847, 848, 849, 850, 851, 852, 853, 854, 855, 856, 857, 858, 859, 860, 861, 862, 863, 864, 865, 866, 867, 868, 869, 870, 871, 872, 873, 874, 875, 876, 877, 878, 879, 880, 881, 882, 883, 884, 885, 886, 887, 888, 889, 890, 891, 892, 893, 894, 895, 896, 897, 898, 899, 900, 901, 902, 903, 904, 905, 906, 907, 908, 909, 910,

HERMAN HIESER,
Defendant in Error,

vs.

DONALD S. ENGELHART, ELISIE
ENGELHART, CARLTON ENGELHART
and GLADYS ENGELHART,
Plaintiffs in Error.

Error to Municipal Court
of Chicago.

270 I.A. 620¹

MR. JUSTICE MARCHETT DELIVERED THE OPINION OF THE COURT.

Plaintiff is the owner and holder of a note of the principal sum of \$7,000. The note was made by Cecilia E. Ahern and Joseph A. Ahern August 25, 1928, and is by its terms payable to bearer and due one year after date. The note states upon its face that it is secured by a trust deed of even date.

Plaintiff filed a statement of claim which set up the execution and delivery of this note and a memorandum of agreement made August 27, 1930, between Foreman-State Trust & Savings Bank, the then owner, and defendants, whereby the time of payment of the note was extended for a term of one year. The statement averred that payment had been demanded and refused and that there was due to plaintiff from defendants for principal and interest \$7227.50.

An affidavit was attached to the statement of claim to the effect that the suit was for recovery of money only; that the demand was for money due upon this promissory note and the agreement for extension thereof as set forth in the claim, and that after allowing all just credits, deductions and set-offs the sum of \$7227.50 was due.

Defendants appeared and made a motion to strike the statement of claim, which was overruled. Defendants then filed an affidavit of merits, which was stricken. They thereafter made a motion to strike that part of the statement of claim in which plaintiff sought to charge defendants with liability for \$7,000. This motion

was denied. Thereafter an amended affidavit of merits was interposed, which upon motion of plaintiff was stricken. Defendants electing to abide by their affidavit of merits, their default was taken, and the court after hearing the evidence found for plaintiff and assessed damages at \$7779.38, being the amount of the principal note and coupon, with interest thereon. This judgment we are asked to reverse.

The pleadings admit that on August 27, 1930, the Foreman-State Trust & Savings Bank, then the owner of the principal note, entered into a written memorandum of agreement with defendants for the extension of the payment of the note, and that at that time they executed two interest notes or coupons for the sum of \$227.30 each, evidencing the interest which would thereafter accrue upon the note for the extended period. Defendants admit their liability upon the extension interest coupons dated August 27, 1930, for \$227.30 each, but deny that under the terms of the extension agreement they are obligated to pay the principal indebtedness - and that is the controlling question for consideration in the case. We regret the necessity of considering the question without any brief presented in behalf of plaintiff.

Defendants, analyzing the written memorandum for extension, say: "This is not an absolute but a conditional or defeasible extension for one year. The extension is given subject to two conditions, - first, prompt payment of interest, and second, the keeping and performing of the covenants and agreements contained in the principal note and trust deed. These conditions are conditions subsequent. The failure of the defendants, within the extension year to promptly pay interest or to perform the covenants and agreements of the note or trust deed, would defeat and determine the extension before the termination of the year. Nowhere in this

paragraph is there any assumption or agreement by the defendants to pay the Ahern note." Defendants cite 5 Page on Contracts, sec. 2576, where that author points out the qualities which distinguish a condition from a covenant, but fail to cite section 2579 by the same author, which states:

"Whether a provision is a condition or a covenant depends upon the intention of the parties as deduced from the language of the contract when read in the light of the surrounding circumstances."

A consideration of this memorandum of agreement in its entirety leaves no doubt in our minds as to the intention of these parties. In the first paragraph it names the Bank as party of the first part and defendants as parties of the second part. In the second paragraph it recites that the party of the first part is the legal owner and holder of the note, describing it and the property conveyed to secure its payment. In the next paragraph it recites that "said second parties desire to have the payment of Seven Thousand Dollars of said note extended for one year from August 25, 1930, in consideration of the agreement hereinafter made on their part." In the following paragraph the Bank agrees (the note again described) to extend the time of payment of the note for one year "so long as the said parties of the second part shall promptly pay interest * * * at the rate of 6 $\frac{1}{2}$ per cent per annum * * * and shall further keep and perform all and singular the covenants and agreements in said note and trust deed contained." In the next paragraph the parties of the second part, i. e., defendants, agreed to accept "said extension upon the conditions aforesaid * * * and further agree that all of the agreements, stipulations, powers and covenants in said principal note and trust deed mentioned shall stand and remain unchanged and in full force and effect for said extended period and any subsequent extension thereof, except only, etc., * * * or in the event of the failure

to pay either or any of said interest notes at the time and place, when and where, the same respectively become due, or to keep, fulfill and perform any and all of the covenants and agreements contained in said trust deed, then the whole of said principal sum shall, at the election of the legal holder of said promissory note, become at once without notice due and payable and may be collected, together with all accrued interest thereon, in the same manner as if said extension or extensions had not been granted, *** and the undersigned until the payment of said mortgage do hereby waive and release all dower and homestead rights in and to said real estate under and by virtue of the laws of the State of Illinois." The instrument is executed by all the parties under seal.

The agreement provides, in substance, as we construe it, that defendants are to keep all the agreements and covenants contained in the note and trust deed and defendants agree to and accept the extension "upon the conditions" named. Even if the word "conditions" should be construed to have the technical meaning given to that word in the development of the feudal law, these would be construed as conditions precedent rather than as conditions subsequent as defendants contend, but when we consider the subject matter of this memorandum, the circumstances recited and the language of the whole agreement, it is apparent, we think, and must be held that the conditions were in the thoughts of the parties covenants which they agreed to perform. One of these conditions or covenants was to pay the principal note, and to that obligation we cannot entertain a doubt, defendants bound themselves.

Defendants have cited a large number of cases such as North & South Rolling Stock Co. v. O'Hara, 73 Ill. App. 691; Bevell v. Wheeler, 27 N. Y. Super. Ct. (4 Rob.) 247; Hale v. Finch, 104 U. S. 261; Sanitary District of Chicago v. Chicago Title and Trust

[illegible]

The agreement provided, in substance, that the Government of the United States was to loan all the equipment and materials contained in the list and that the Government of the United States was to pay the principal and interest on the loan. The agreement also provided that the Government of the United States was to pay the principal and interest on the loan. The agreement also provided that the Government of the United States was to pay the principal and interest on the loan.

Reference was made to a large number of cases with the following results:

Case No.	Case Name	Case Description
1	100-100000-100000	100-100000-100000
2	100-100000-100000	100-100000-100000
3	100-100000-100000	100-100000-100000
4	100-100000-100000	100-100000-100000
5	100-100000-100000	100-100000-100000
6	100-100000-100000	100-100000-100000
7	100-100000-100000	100-100000-100000
8	100-100000-100000	100-100000-100000
9	100-100000-100000	100-100000-100000
10	100-100000-100000	100-100000-100000

Co., 278 Ill. 529. It would serve no useful purpose to review and distinguish these cases where the subject matter, the language of the agreement and the manifest intention of the parties were quite different from those appearing in this record, nor are cases such as Buchsbaum v. Halper, 265 Ill. App. 226, which defendants cite, in any way in point.

Defendants also contend that the statement of claim is insufficient to charge them on their note. We hold it was sufficient under section 49 of the Municipal Court act (Smith-Hurd Ill. Rev. Stat., chap. 37, par. 395, sec. 49, p. 953.)

For the reasons indicated the judgment of the trial court is affirmed.

AFFIRMED.

McSurely, P. J., and O'Connor, J., concur.

36330

P. M. SMITH,
Defendant in Error,
vs.

4/ A
ERROR TO MUNICIPAL COURT
OF CHICAGO.

LOUIS HEYDEN, MRS. M. ARNDT
and ALBERT HEYDEN, Defendants.

MARY ARNDT and ALBERT HEYDEN,
Plaintiffs in Error.

270 I.A. 620²

MR. JUSTICE O'CONNOR DELIVERED THE OPINION OF THE COURT.

Plaintiff, who is engaged in the undertaking business, brought suit against Louis Heyden, Mrs. M. Arndt and Albert Heyden to recover \$553.08, claimed to be due him for his bill in burying Charles Heyden, the son of defendant Louis Heyden and nephew of the other two defendants. Plaintiff dismissed his suit as to Louis Heyden, there was a jury, and at the close of all the evidence the court directed a verdict in favor of the plaintiff for the amount of his claim. The verdict was accordingly returned, judgment entered on the verdict, and defendants appeal.

The record discloses that plaintiff was engaged in the undertaking business at 17 Madison street, Oak Park, Illinois, and had been engaged in that business for a great many years; that about May 4, 1931, plaintiff saw Louis Heyden, father of deceased, and certain other relatives of deceased, with a view of obtaining plaintiff's services in the burial of deceased, a man about 40 years of age, whose body was found near Lockport, Illinois. It further appears that plaintiff furnished a casket and other material in and about the burial as well as a hearse, automobiles, etc.; that plaintiff went to Lockport and obtained the body from an undertaker there, took it to his place of business in Oak Park, and on May 6th conducted the funeral, the body being buried in the Forest Home Cemetery; that plaintiff paid money out of his own pocket and

E. M. WHITE,
Defendant in Error,

vs.

LOUIS HAYDEN, MAR. M. WHITE
and ALBERT HAYDEN, Defendants.

WIT ABOUT AND ALBERT WHITE,
Plaintiffs in Error.

WRITING TO JUDICIAL COURT

OF CHICAGO.

25014.620

THE JUSTICE OF THE PEACE COURT OF THE COUNTY OF COOK, ILLINOIS.

Plaintiff, who is engaged in the undertaking business, presents this suit against Louis Hayden, E. M. White and Albert Hayden to recover \$500.00, claimed to be due him for his bill in paying Charles Hayden, the son of defendant Louis Hayden and nephew of the other two defendants. Plaintiff dismissed his suit as to Louis Hayden, there was a jury, and at the close of all the evidence the court directed a verdict in favor of the plaintiff for the amount of his claim. The verdict was accordingly returned, judgment entered on the verdict, and defendant's appeal.

The record discloses that plaintiff was engaged in the undertaking business as it within itself, Oak Park, Illinois, and had been engaged in that business for a great many years; that about May 4, 1931, plaintiff saw Louis Hayden, father of deceased, and certain other relatives of deceased, with a view of obtaining plaintiff's services in the burial of deceased, a man about 40 years of age, whose body was found near Lockport, Illinois. It further appears that plaintiff furnished a casket and other material for and about the burial as well as a hearse, automobiles, etc.; that plaintiff went to Lockport and obtained the body from an undertaker there, took it to his place of business in Oak Park, and on May 6th conducted the funeral, the body being buried in the Forest Home Cemetery; that plaintiff sold money out of his own pocket and

incurred liabilities which go to make up most of the items of the bill; he paid \$82.50 to the undertaker at Lockport; he paid or became liable to pay the minister who conducted the religious services at the funeral, \$10; he became liable for the cost price of the casket and a suit of clothes for deceased, and other items mentioned in the bill.

The evidence also is that on May 6th, at plaintiff's place of business, just before the funeral services, plaintiff demanded of defendants that he be paid before he would proceed further with the burial. Defendant Mary Arndt testified that she first met plaintiff May 6th at his undertaking establishment shortly before the funeral; that "Mr. Smith (plaintiff) said there would be no funeral until this bill was signed." On cross-examination she testified, "I signed it because he said there would be no funeral. I saw the figures \$300 for a casket." The defendant Albert Heyden testified that he did not tell plaintiff he would pay the bill; said "Nothing much, just signed the bill. I just told Mr. Smith I would put my name on it. I thought it was just put down as a witness for the name of Mary Arndt, my sister." Smith said there wouldn't be a funeral unless we signed. -- Mr. Smith said there would be no funeral unless I signed my name to the bill; that he wouldn't go ahead with the funeral unless I signed my name. I wanted the funeral to go ahead." Louis Heyden, father of deceased, and who was originally sued but who was dismissed out of the case on plaintiff's motion, testified for the defendants that he met plaintiff about May 5th, the day before the funeral; that they talked about the burial and plaintiff asked who was going to pay for the funeral and witness replied, "You can't get the money off me, because I haven't got it. Take it off his estate;" that just before the funeral the witness refused to sign plaintiff's bill;

...mentioned in the bill.

The witness also is that on May 25th, at Plaintiff's place of business, just before the funeral services, Plaintiff advised of defendant that he had before he would proceed further with the funeral. Defendant Mary Smith testified that she first met Plaintiff May 25th at his undertaking establishment shortly before the funeral; that Mr. Smith (Plaintiff) said there would be a funeral until this bill was signed. On cross-examination she testified, "I signed it because he said there would be no funeral. I saw the funeral home for a week." The defendant Albert Hayden testified that he did not tell Plaintiff he would pay the bill; said "nothing much, just signed the bill. I just said Mr. Smith would put my name on it. I thought it was just put down as a witness for the name of Mary Smith, my sister. ... I said there wouldn't be a funeral unless we signed. ... Mr. Smith said there would be no funeral unless I signed my name to the bill; that he wouldn't go ahead with the funeral unless I signed my name. I wanted the funeral to go ahead." Louis Hayden, father of defendant and who was originally sued and who was dismissed out of the case as Plaintiff's witness, testified for the defendant that he met Plaintiff about May 25th, the day before the funeral; that they talked about the burial and Plaintiff asked who was going to pay for the funeral and witness replied, "I am" and the money all he, because I haven't got it. Take it off his estate; that just before the funeral the witness refused to sign Plaintiff's bill;

that plaintiff then said, "There would be no funeral" unless the bill was signed and witness replied that he would sign nothing; that his sister and brother, the defendants, wanted to see the funeral go ahead and then signed the bill; that witness would not sign the bill because he could not pay it; that he had no money.

Mildred Gerler, sister of deceased, called by defendants, testified that she was at plaintiff's place of business on the day of the funeral; that she saw her aunt and uncle sign the bill in question; that plaintiff said "there would be no funeral unless my father would sign. He said he could not sign it. So they would not let the funeral go on, so my aunt and uncle signed their names."

William F. Arndt, son of defendant Mary Arndt, testified that he was present when plaintiff's bill was signed by his mother and uncle; that "Smith said to them that the bill would have to be signed or there would be no funeral. In fact, he asked me to sign it, and I said, 'No' that I had no work, I could not sign it;" that then his mother and uncle signed the bill.

Above the defendants' signatures on the bill appears the following in typewriting: "I will be responsible for the payment of this bill." Plaintiff and a number of witnesses testified that these words were on the bill before it was signed by the two defendants. The defendants and a number of witnesses testified that these words were not on the bill at the time.

On a motion to direct a verdict for the plaintiff, the court cannot weigh the evidence, but all of the evidence in the record must be viewed in the light most favorable to the defendants, and if there is any evidence, more than a scintilla, the motion should be denied, and this too even though the court was of the opinion that if the jury rendered a verdict for the defendants he would have to set it aside on motion for a new trial. Libby, McNeill & Libby v. Cook, 222 Ill. 306.

that plaintiff then said, "There would be no funeral" unless the bill was signed and witness replied that he would sign nothing; that his sister and brother, the defendants, wanted to see the funeral go ahead and then signed the bill; that witness would not sign the bill because he could not pay it; that he had no money. Witness Geller, sister of deceased, called by defendants, testified that she was at plaintiff's place of business on the day of the funeral; that she saw her aunt and uncle sign the bill in question; that plaintiff said "There would be no funeral unless my father would sign. He said he could not sign it. So they would not let the funeral go on, so my aunt and uncle signed their names." William E. Ayndt, son of defendant Mary Ayndt, testified that he was present when plaintiff's bill was signed by his mother and uncle; that "Uncle said to them that the bill would have to be signed or there would be no funeral. In fact, he asked me to sign it, and I said, 'No! I had no work, I could not sign it.' That was the matter and uncle signed the bill. Above the defendants' signatures on the bill appears the following in typewriting: "I will be responsible for the payment of this bill." Plaintiff and a number of witnesses testified that these words were on the bill before it was signed by the two defendants. The defendants and a number of witnesses testified that these words were not on the bill at the time. On a motion to direct a verdict for the plaintiff, the court cannot weigh the evidence, but all of the evidence in the record must be viewed in the light most favorable to the defendant, and if there is any evidence, more than a scintilla, the motion should be denied, and this too even though the court was of the opinion that if the jury rendered a verdict for the defendants he would have to set it aside on motion for a new trial. Willis v. Willis 222 Ill. 202.

The question therefore is, Is there more than a scintilla of evidence that the defendants are not liable?

The defendants argue in their brief that the great weight of the evidence is that the words, "I will be responsible for the payment of this bill" were not written on the bill at the time it was signed by the defendants, and that there was no consideration moving to defendants and therefore the alleged contract is unenforceable. The testimony in the record as to whether the words above quoted were written on the bill before defendants put their names on it, is in sharp conflict; but if this was of any importance in the decision of this case, the action of the court in directing a verdict for the plaintiff would have to be reversed. We are of opinion that these words are of no importance, because the undisputed evidence is, as testified to by plaintiff and all the defendants, and other witnesses called by defendants, whose testimony we have heretofore mentioned, that plaintiff stated that unless defendants put their names on the bill he would refuse to go on with the funeral. It is obvious that everyone present, including the defendants, understood that the defendants by signing their names to the bill agreed to pay it. Louis Heyden, father of the deceased, and William F. Arndt, son of Mrs. Arndt, one of the defendants, both testified that they refused to sign the bill at the time because they had no money or no work.

As to the contention that there was no consideration moving to the defendants for putting their names on the bill, it is sufficient to say that plaintiff extended credit to them for the amount of the bill, all the evidence showing that he refused to proceed with the funeral unless they agreed to pay the bill. The credit having been given to them, it is elementary, under the law, that the consideration was sufficient. There being not more than a

The question involved is, is there any such thing as a contract of evidence that the defendant was not liable?

The defendant argues in their brief that the great weight of the evidence is that the words, "I will be responsible for the payment of this bill" were not written on the bill at the time it was signed by the defendant, and that there was no consideration moving to defendant and therefore the alleged contract is not enforceable. The testimony in the record as to whether the words were written was written as the bill itself testifies that it was not written on it, as is clearly testified; but it was of any importance in the creation of this case, the action of the court in directing a verdict for the plaintiff would have to be reversed. We are of opinion that those words are of no importance, because the whole case is based on the fact that the bill was not written on it, and other witnesses called by defendant, whose testimony we have previously mentioned, that plaintiff stated that unless defendant put their names on the bill he would refuse to go on with the transaction. It is stated that everyone present, including the defendant, understood that the defendant by signing their names to the bill agreed to pay it. Louis Kaplan, father of the defendant, and William K. Smith, son of Mrs. Arab, one of the defendants, both testified that they refused to sign the bill at the time because they had no money or no work.

As to the contention that there was no consideration moving to the defendant for putting their names on the bill, it is sufficient to say that plaintiff extended credit to them for the amount of the bill, all the evidence showing that he refused to extend credit with the funds unless they agreed to pay the bill. The credit having been given to them, it is elementary, under the law, that the consideration was sufficient. There being no more than a

scintilla of evidence to the effect that the defendants were not liable, there was nothing for the jury to decide, and the court did not err in directing a verdict.

The judgment of the Municipal court of Chicago is affirmed.

AFFIRMED.

McSurely, P. J., and Matchett, J., concur.

36346

JAMES M. SHACKELFORD,
Appellee.

vs.

THE BELT RAILWAY COMPANY
OF CHICAGO, a Corporation,
Appellant.

42
APPEAL FROM SUMMER COURT
OF COOK COUNTY.

270 I.A. 620³

MR. JUSTICE O'CONNOR DELIVERED THE OPINION OF THE COURT.

Plaintiff brought an action against the defendant to recover damages for personal injuries. There was a verdict and judgment in his favor of \$25,000, and defendant appeals.

The record discloses that about 1:15 on the morning of January 18, 1932, plaintiff, who was employed as a switchman by the defendant Railway company, while in the performance of his duties in switching cars in its yards at Clearing, Illinois, claims to have been severely injured on account of the negligence of another switchman who was handling one of defendant's cars, as a result of which the car struck ^{the} one plaintiff was handling, with great force and violence, throwing plaintiff into the gondola car and severely injuring him.

The work in which plaintiff was engaged was interstate commerce and he predicates his right of action under the provisions of the Employer's Liability act.

The defendant, Belt Railway Company, maintains a yard at Clearing, Cook county, Illinois, where it distributes cars to other railroad companies and for this purpose the ground is elevated about 30 feet forming a hill, which is designated in the record as a "hump." The cars are brought up to the top of the hump and there uncoupled, a brakeman or switchman being in charge of each car; the cars run down the hump by force of gravity and are switched to the proper railroad track; they are controlled by

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the switchman. At the time in question plaintiff was on the front end of an empty gondola hopper bottom coal car, applying the brake as required, and the evidence shows that when the car was running into the proper track it was struck in the rear by another car coming down from the hump in charge of another switchman, with such force that it caused plaintiff to be thrown back into the empty gondola car against an I-beam that was across the car. Plaintiff's testimony is that his back was severely injured. He testified that after he was thrown and injured he got out of his car, walked a short distance to an electric car used to carry the men back to the top of the hump, and that he continued with his work, bringing down other cars for an hour or more; that he complained to the yardmaster in charge of the switchmen that he was injured and unable to continue his work and wanted to go home, and finally between two and three o'clock he was compelled to quit work, and drove his automobile to his home, a distance of about five miles.

The evidence further is to the effect that during the next three or four days plaintiff telephoned his superiors advising them that he was unable to go to work. The third day he saw a doctor who found that plaintiff was suffering from a scraped or bruised right thigh and considerable abnormality as to the motion of the hip and knee joint; that later the doctor recommended that an X-ray picture be taken and communicated with the railway officials, who caused plaintiff to be sent to a hospital where an X-ray picture was taken of his back. Afterward plaintiff saw other doctors who took an X-ray picture about February 1st and two others were taken about June 15th - about fifteen days before the case went to trial on June 29th.

The evidence further shows that November 12, 1925, about the time plaintiff was being employed by the defendant, defendant caused

The witness, at the time in question plaintiff was on the train and of an empty baggage holder below seat car, occupying the space as required, and the evidence shows that when the car was running into the power track it was struck in the rear by another car coming down from the hump in course of another movement, with such force that it caused plaintiff to be thrown back into the empty baggage car which he landed on 1-10-1911 and caused the air. Plaintiff's testimony is that his back was severely injured. He testified that after he was thrown and injured he got out of his car, walked a short distance to an electric car used to carry the men back to the top of the hump, and that he continued with his work, bringing down other cars for an hour or more; that he complained to the yardmaster in charge of the movement that he was injured and unable to continue his work and wanted to go home, and finally between two and three o'clock he was conveyed to his work, and drove his automobile to his home, a distance of about three miles.

The witness further is to the effect that during the next three or four days plaintiff telephoned his superiors advising them that he was unable to go to work. The third day he saw a doctor who found that plaintiff was suffering from a sprain of his right thigh and immediately operated on it the motion of his hip and knee joint; that later the doctor recommended that an X-ray picture be taken and communicated with the railway officials, who caused plaintiff to be sent to a hospital where an X-ray picture was taken of his back. Afterward plaintiff saw other doctors who took an X-ray picture about February 1st and two others were taken about June 1st - about fifteen days before the case went to trial at that time.

The evidence further shows that November 12, 1910, about the time plaintiff was being employed by the defendant, defendant caused

an X-ray picture to be taken of plaintiff's spine and back. The five X-ray pictures are in the record, three of them were offered by plaintiff, one being taken on February 2, 1932, and the other two in June, 1932; and the two on behalf of defendant, one taken in 1925 and the other about February 1, 1932. From an examination of these X-ray pictures, which are in the record, we are unable to discover any material difference between them, or any evidence of a fracture of any of the vertebrae. All the witnesses who were at the yards at the time plaintiff claimed he was injured, including the witness Curlee, called by plaintiff, testified that plaintiff made no complaint at the time that he had been injured, but his complaint was that he was "sick" because of a physis he had taken. Plaintiff, however, testified that he told the yardmaster he had been injured and was unable to continue his work.

Plaintiff called three witnesses to read the three X-ray pictures offered by plaintiff - John E. Kingrene, a roentgenologist, who testified that he was experienced in taking and reading of X-ray pictures and who took the two pictures of plaintiff's spinal column in June, 1932; Dr. Scott, who took an X-ray picture of defendant's back on February 1, 1932, and Dr. Hardon. The substance of the testimony of each of these witnesses was that the three X-ray pictures offered by plaintiff showed fractures of the 2nd and 5th lumbar vertebrae and evidence of other injuries.

An X-ray technician connected with St. Bernard hospital testified that she took an X-ray picture of defendant's spinal column November 12, 1925, and delivered it for diagnosis to Dr. Cushman. This picture is in the record. Dr. Pond, called by defendant, testified that he was a radio technician and took a picture of plaintiff's spinal column on January 28, 1932. This picture is in the record. Defendant called Drs. Dick and Gilmore, who testified to their ability to read X-ray pictures and gave other testimony to the

an X-ray picture to be taken of Plaintiff's spine and back. The five X-ray pictures are in the record, taken of same were offered by Plaintiff, one being taken on February 2, 1933, and the other two in June, 1933, and the two on behalf of defendant, one taken in 1933 and the other about February 1, 1933. From an examination of these X-ray pictures, which are in the record, we are unable to discover any material difference between them, or any evidence of treatment of any of the vertebrae. All the witnesses who were at the time of the first picture alleged to have injured, including the witness called by Plaintiff, testified that Plaintiff was not complaining at the time that he had been injured, but his complaint was that he was "aching" because of a sprain he had taken. Plaintiff, however, testified that he told the physician he had been injured and was unable to continue his work.

Plaintiff called three witnesses to read the three X-ray pictures offered by Plaintiff - John E. Shannon, a neurologist, who testified that he was convinced in reading and viewing of X-ray pictures and was that the two pictures of Plaintiff's spine taken in June, 1933; Dr. Scott, who took an X-ray picture of defendant's spine on February 1, 1933, and Dr. Gordon. The substance of the testimony of each of these witnesses was that the three X-ray pictures offered by Plaintiff showed fractures of the two and three vertebrae and evidence of other injuries.

An X-ray examination conducted with Dr. Raymond Hough and testified that the two X-ray pictures of defendant's spine taken in June, 1933, and defendant's for diagnosis to Dr. Conway. This picture is in the record. Dr. Ford, called by defendant, testified that he was a radio technician and took a picture of Plaintiff's spine taken on January 22, 1933. This picture is in the record. Defendant called Dr. Ford and himself, who testified that their ability to read X-ray pictures and gave their testimony in the

effect that none of the five X-ray pictures shows any fracture of any of the vertebrae or any evidence of other injuries, and further that there was no appreciable difference shown between the picture taken in 1925 and the four taken after plaintiff claims to have been injured.

The record discloses that at the close of the testimony of Dr. Gilmore, who was the last of the witnesses called to read the X-ray pictures, counsel for defendant stated that he had some other medical testimony, but the court said he would allow no more medical testimony - "I will limit medical testimony; they had two and you had two; there is nothing better settled than that the court can limit the expert testimony." Defendant's counsel excepted, saying "There was no limit placed at the time plaintiff offered his testimony." The court then stated that made no difference, - "plaintiff had two experts to read the films, you had two experts to read the films."*** They had two with their roentgenologist and you had two with the roentgenologist and Dr. Riley." At this point, the record discloses, court and counsel went into chambers, and after considerable discussion counsel for defendant stated he wanted to call Dr. Mitchell, Dr. Cusaway and Dr. Hubeney, for the purpose of reading the X-ray pictures, the one taken in 1925, and the four taken in 1932, and that they would testify that there was no evidence of fracture of the vertebrae or of other injuries to the spine. The court refused to permit this but stated that defendant might call any of the doctors who ^{had} made a physical examination of plaintiff, that the testimony of the three doctors last mentioned would be cumulative, and therefore refused to permit them to testify. There is some other evidence in the record which we have not adverted to because we have reached the conclusion that there must be another trial.

Defendant contends that the declaration was not sufficient

effect that none of the five X-ray pictures show any fracture of any of the vertebrae or any evidence of other injuries, and further that there was no material difference between the picture taken in 1932 and the later taken after plaintiff claims to have been injured.

The expert testimony that of the close of the testimony of Dr. Allison, who was the last of the witnesses called to read the X-ray pictures, counsel for defendant stated that he had some other medical testimony, and the court said he would allow no more medical testimony - "X will still medical testimony; they had two and you had two; there is nothing better called than that the court can find the expert testimony." Defendant's counsel objected, saying "There was no limit placed on the plaintiff's effort to introduce his testimony." The court then stated that there was no difference, - "plaintiff had two experts to read the films, you had two experts to read the films; they had two with their radiologists and you had two with the radiologists and Dr. Wiley." At this point, the record shows, court and counsel went into chambers, and after conferring, defendant's counsel for defendant asked he wanted to call Dr. Allison, Dr. Conway and Dr. Libbey, for the purpose of reading the X-ray pictures, the one taken in 1932, and the later taken in 1933, and that they would testify that there was no evidence of fracture of the vertebrae or of other injuries to the spine. The court refused to permit this but stated that defendant might call any of the doctors to make a physical examination of plaintiff, and that the testimony of the three doctors last mentioned would be inadvisable, and therefore refused to permit them to testify. There is some other evidence in the record which we have not referred to because we have reached the conclusion that there must be another trial.

Defendant contends that the decision was not arbitrary.

to support the verdict; that the sole allegations upon which liability was predicated was the negligent driving of the car which struck the car plaintiff was operating; that plaintiff did not attempt to prove that allegation, but that the only proof it offered was to the effect that the brake was in good condition at the start but suddenly failed to work. We think the evidence tended to show that the man in charge of the second car was negligent in driving the car, at least the question was for the jury to decide.

Complaint is also made that the court erred in admitting one of the X-ray pictures offered by plaintiff on the ground that there were red arrow marks pointing out alleged pathology. We think there is no merit in this contention because the testimony is to the effect that the red arrows in no way obliterated any part of the picture or that they in any way interfered with the reading or the understanding of the film.

We think the contention of the defendant, that the court erred in refusing to permit it to call the three Doctors to read the X-ray pictures above referred to, must be sustained. While it is the law that the court, in the exercise of sound discretion, may limit the number of expert witnesses (Gochsagan v. Union E.I.R.R.Co., 266 Ill. 432), yet we are of the opinion that as a general proposition, this should be done at the beginning of the trial. Green v. Phoenix Mutual Life Ins. Co., 134 Ill. 310. In the case last cited, the application of the rule limiting witnesses, involved lay, not expert, witnesses; but we think what was there said is appropriate here. The court there said (p.316): "Moreover, if the power of the trial court to limit the number of witnesses, as here exercised, existed, which can not be conceded, it should have been done at the beginning of the trial, so as to give each party an opportunity of selecting such witnesses as might be deemed most important." And the court there further said that limiting the

to support the verdict; that the sole allegations upon which the
bill was presented was the negligence driving of the car which
attacked the car plaintiff was operating; that plaintiff did not attempt
to prove that allegation, but that the only proof it offered was in
the effect that the verdict was in favor of plaintiff in the trial and
subsequently failed to work. We think the evidence tended to show
that the man in charge of the second car was negligent in driving
the car, at least the question was for the jury to decide.
Conclusion is also made that the court erred in admitting
one of the X-ray pictures offered by plaintiff on the ground that
there were red arrows pointing out alleged pathology. We
think there is no merit in this contention because the testimony is
to the effect that the red arrows in no way substantiated any part
of the picture or that they in any way interfered with the reading
or the understanding of the film.
We think the contention of the defendant, that the court
erred in refusing to permit it to call the three doctors to read
the X-ray pictures above referred to, must be sustained. While it
is the law that the court, in the exercise of sound discretion, may
limit the number of expert witnesses (See Johnson v. State, 11 A.2d 200,
203 Ill. 433), yet we are of the opinion that on a general propo-
sition, there should be some at the beginning of the trial. State
v. John A. Mahoney, 11 A.2d 200, 203 Ill. 433. In the case last
cited, the testimony of the three doctors, introduced
late, not expert, witnesses; but we think what was there said is
unquestionable. The court there said (p. 203): "Moreover, it
the power of the trial court to limit the number of witnesses, as
here exercised, existed, which can not be conceded, it should have
been done at the beginning of the trial, so as to give each party
an opportunity of selecting such witnesses as might be deemed most
important." And the court there further said that limiting the

number of witnesses in that case was erroneous, (p. 317) "especially must this be so where the order was made after the designated number of witnesses had been examined by her." In the instant case there was no intimation that the number of witnesses would be limited until the second Doctor had read the X-ray films when the court announced he would hear no more. Had defendant's counsel been aware that there was to be a limitation placed on the number of expert witnesses, he might have called some of the three Doctors since he might be of the opinion that their testimony would be more important.

Furthermore, the statement of the court that each side had the testimony of two experts who had read the films, might lead the jury erroneously to infer that the court was of the opinion that the testimony on this vital question was approximately equal. Moreover, plaintiff had three expert witnesses who read the three films introduced by plaintiff, and not two witnesses; while on the other hand, the defendant had called but two witnesses ^{five} who read the X-ray pictures, the one taken in 1935, nearly seven years before the accident, and the four taken after plaintiff claims he was injured.

The question whether plaintiff's spinal column was fractured and otherwise injured, as a result of which he was severely and permanently disabled, or whether there were no fractures or other evidence of injuries, and no appreciable difference between the spinal column as shown by the film taken before the accident and those taken after it, or whether plaintiff was injured at all in the performance of his duties as claimed, were of vital importance. The claimed injuries to plaintiff's spinal column were the basis of practically all of plaintiff's claimed damages, because there is no claim that the injury suffered by plaintiff, outside of those, was of ^{much} ~~any~~ consequence. We think the limitation of the

number of witnesses in that case was extremely small, especially
must take it as a matter of fact that the defendant was
box of witnesses had been examined by her. In the instant case
there was no indication that the number of witnesses would be
limited with the same result and that the jury was the
court announced he would hear no more. The defendant's counsel
then asked that there was to be a decision based on the number
of expert witnesses, he asked that called none of the expert
witnesses also he might be of the opinion that their testimony
would be very important.

Furthermore, the statement of the court that each side
had the testimony of two experts was not the time, when
lead the jury extremely to infer that the court was of the opin-
ion that the testimony on this vital question was approximately
equal. However, plaintiff had three expert witnesses who read
the three lines introduced by plaintiff, and not two witnesses;
while on the other hand, the defendant had called but two witnesses
who read the ^{five} ~~three~~ lines, the one taken in 1938, nearly seven
years before the accident, and the four taken after plaintiff
claim he was injured.

The question whether plaintiff's spinal column was fractured
and otherwise injured, as a result of which he was severely and
permanently disabled, or whether there were no fractures or other
evidence of injuries, and no appreciable difference between the
expert opinion as shown by the film taken before the accident and
those taken after it, or whether plaintiff was injured at all in
the performance of his duties as claimed, were of vital importance.
The claimed injuries to plaintiff's spinal column were the basis
of practically all of plaintiff's claimed damages, because there is
no claim that the injury suffered by plaintiff, outside of these,
was of ~~xxxxxxx~~ consequence. He took the likelihood of the
much

number of expert witnesses, and what was said at the time, was prejudicially erroneous.

Defendant further contends that the court erred in refusing to give to the jury an instruction tendered by it. The instruction was to the effect that the defendant was not required to guarantee or insure the safety of plaintiff but that it was merely obligated to use ordinary care to prevent unusual risk to him, etc. We think there is no merit in this contention. The Employer's Liability Act requires that a railroad company exercise ordinary care to prevent injury to its employees, not that a railroad company is "merely obliged to use ordinary care to prevent unusual risks, etc." Moreover, the instruction was abstract in form and it has often been held that it is not error to refuse such an instruction.

For the reasons stated the judgment of the Superior court of Cook county is reversed and the cause remanded.

REVERSED AND REMANDED.

McSurely, P. J., and Hatchett, J., concur.

number of expert witnesses, and some was said at the time, was

materially important.

Technical testimony was given that the work was done in 1911.

There is also to the fact an instruction furnished by it. The

instruction was to the effect that the defendant was not required

to guarantee at least the safety of himself but that it was

merely required to use reasonable care in the use of the

gun, etc. We think there is no merit in this contention. The

defendant's liability was established by the evidence and was

not any more to prevent injury to the employee, but that a

railroad company is "merely" obliged to use ordinary care to

prevent personal injury, etc. Moreover, the instruction was not

given in 1911 and it has often been said that it is not error

to refuse such an instruction.

For the reasons stated the judgment of the District Court

is affirmed and the cause remanded.

REVEREND AND HONORABLE.

Respectfully, J. B. and Elizabeth, J. B. and Elizabeth.

36385

AUBURN STOKER SALES CORPORATION,
a Corporation,

Appellee,

vs.

FRED BECKLENBERG,

Appellant.

43
APPEAL FROM MUNICIPAL COURT
OF CHICAGO.

270 I.A. 620⁴

MR. JUSTICE O'CONNOR DELIVERED THE OPINION OF THE COURT.

Plaintiff caused judgment for \$1357.44 to be entered by confession against the defendant on a promissory note. Afterward on defendant's motion the judgment was opened and he was given leave to defend and to file a set-off, claiming that he was entitled to the return of \$148.37 he had paid on account and \$75 expense he had been put to in removing a stoker plaintiff had installed in defendant's building. There was a trial before the court without a jury, the judgment entered by confession was confirmed and defendant appeals.

The record discloses that October 10, 1931, plaintiff and defendant entered into a "Contract of Conditional Sale," whereby plaintiff was to install in a good and workmanlike manner in the 77-apartment building owned by defendant one "Auburn Hydraulic Stoker Complete with Electrical Equipment for AC 60 Cycles 220 Volts 3 Phase and Automatic Control," for which defendant agreed to pay \$1483.30 - \$148.37 on the signing of the contract, the same amount on completion of the installation by plaintiff, and the balance of \$1186.56 to be evidenced by defendant's promissory note payable in 12 equal monthly installments. On the same day, October 10, 1931, defendant executed his installment note payable to plaintiff's order for the \$1186.56. It is on this note that the judgment was confessed.

The evidence shows that during the last days of October,

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107. The instant entry of confession was obtained and defendant
retained a building. There was a trial before the court where a
had been put to in receiving a vessel plaintiff had installed in
the return of \$125.00 he had paid on account and \$75 expense he
to defend and to file a set-off. Plaintiff thus he was entitled to
on defendant's motion the judgment was entered and he was given leave
confession against the defendant as a preliminary step. Plaintiff
plaintiff cannot judgment for \$125.00 as he entered by

The record discloses that October 10, 1951, Plaintiff and defendant entered into a "Contract of Conditional Sale," whereby Plaintiff was to install in a good and workmanlike manner in the 77-apartment building owned by defendant the "AMERICAN HYDRAULIC" elevator complete with electrical equipment for 40 80 cycles 220 Volts 3 phase and automatic control, "for which defendant agreed to pay \$1485.00 - \$148.37 on the signing of the contract, the same amount on completion of the installation by Plaintiff, and the balance of \$1186.50 to be evidenced by defendant's promissory note payable in 12 equal monthly installments. On the same day, October 10, 1951, defendant executed his installment note payable to Plaintiff's order for the \$1186.50. It is on this note that the Judge-

Деловый мир

THE PAYMENT ABOVE MADE DURING THE YEAR ENDED 31 MARCH 1964.

1931, plaintiff installed the stoker in defendant's apartment building, but instead of using a 3 phase motor, as mentioned in the contract, it used a 1 phase motor; that complaint was made by defendant from practically the beginning that the stoker did not work properly, and plaintiff sent men to the apartment building from time to time in an endeavor to see what was wrong and to remedy the difficulty. Plaintiff offered some evidence to the effect that upon tests being made it was found the stoker was operating properly. On the other hand, we think the overwhelming weight of evidence shows that the stoker never did work properly and that defendant continually made complaints and in January asked plaintiff to remove the stoker from the building because of the unsatisfactory manner in which it operated. Negotiations were carried on until about April 1st, - plaintiff endeavoring to see that the motor worked properly, but without success, when at that time defendant removed the stoker because plaintiff refused to do so.

Plaintiff admits that it did not use the 3 phase motor as mentioned in the contract but instead used a 1 phase motor, and there was some evidence tending to show that a 1 phase motor was slightly more expensive than a 3 phase motor.

It further appears from the evidence that the Commonwealth Edison Co., which furnished electricity to the building, apparently for lighting purposes, on December 8, 1931, advised defendant that it would not continue to furnish power to defendant, partly on account of the single phase motor plaintiff had installed. A salesman of plaintiff testified that he inspected the stoker about the 18th or 20th of November at defendant's request, and there had a discussion with defendant's representatives, and "we (plaintiff) offered to install a three-phase motor thereafter if Becklenberg would install the wiring." It further appears that defendant

1937. Plaintiff installed the motor in defendant's apartment building, but instead of being a 3 phase motor, as mentioned in the contract, it was a 1 phase motor; that complaint was made by defendant from practically the beginning that the motor did not work properly, and plaintiff went on to the apartment building from time to time in an endeavor to see what was wrong and to remedy the difficulty. Plaintiff offered some evidence to the effect that upon tests being made it was found the motor was operational property. On the other hand, we think the overwhelming weight of evidence shows that the motor never did work properly and that defendant continually made complaints and in January asked plaintiff to remove the motor from the building because of the unsatisfactory manner in which it operated. Negotiations were entered on April 1st, - plaintiff endeavoring to see that the motor worked properly, but without success, when at that time defendant removed the motor because plaintiff refused to do so.

Plaintiff admits that it did not use the 3 phase motor as mentioned in the contract but instead used a 1 phase motor, and there was some evidence tending to show that a 1 phase motor was actually used.

It further appears from the evidence that the Commonwealth Edison Co., which furnished electricity to the building, apparently for lighting purposes, on November 8, 1931, advised defendant that it would not continue to furnish power to defendant, partly on account of the single phase motor plaintiff had installed. A notice of plaintiff testified that he requested the notice about the 10th or 12th of November at defendant's request, and there was a discussion with defendant's representative, and the plaintiff offered to install a three-phase motor whereafter it is contended would install the wiring." It further appears that defendant

refused to do this. There is considerable evidence in the record as to whether defendant used the proper kind of coal in the stoker, and further evidence that three different kinds of coal were used. As stated, the evidence shows that shortly after the stoker was installed constant complaints were made orally and in writing by the defendant that the stoker was working improperly; and that plaintiff endeavored on numerous occasions to eliminate the complaints made, but without success.

Plaintiff contends, as we understand it, that even if the stoker did not work properly, defendant could not rescind the sale because he had used the stoker too long, - from the early part of November until about April 1st. The contract entered into between the parties was a conditional sale, the title to the stoker remaining in plaintiff by the express terms of the contract, until the stoker was fully paid for. The defendant did not use the stoker without complaint, but was constantly complaining that the stoker never worked properly. In these circumstances we think the contention of plaintiff is untenable.

A further contention made by plaintiff is that the contract did not provide for the purchase of a motor; but this is contrary to the express wording of the contract, part of which we have above quoted. And a further argument is, that defendant did not provide suitable wiring so a 3 phase motor might be used. We think this contention is wholly without merit. Plaintiff was in the business of selling and installing stokers and was supposed to be familiar with this work. The defendant was not familiar with the installing of stokers. His building had already been wired and it was the duty of plaintiff to know before it sold the stoker that the building was in proper condition for the installation of the stoker. If other wiring were necessary, it seems obvious that this should have been brought to defendant's attention before the sale was made.

refused to do this. There is considerable evidence in the record as to whether defendant knew the proper kind of coal in the pocket, and further evidence that these different kinds of coal were used. As stated, the evidence shows that shortly after the strike was installed, defendant immediately went to work and in violation of the agreement that the strike was working improperly; and that plaintiff endeavored on numerous occasions to eliminate the same. Plaintiff made, but without success.

Plaintiff contends, as we understand it, that even if the strike did not work properly, defendant could not rescind the sale because he had used the stock too long, - from the early part of November until about April 1st. The contract entered into between the parties was a conditional sale, the title to the stock remaining in plaintiff at the time of the contract, until the stock was fully paid for. The defendant did not use the stock without plaintiff's consent, but was contractually bound to use it; never worked properly. In these circumstances we think the rescission of plaintiff is untenable.

A further contention made by plaintiff is that the contract did not provide for the purchase of a motor; but this is contrary to the express terms of the contract, part of which we have above quoted. And a further argument is, that defendant did not provide plaintiff with a 1924 motor which was used. To meet this contention is wholly without merit. Plaintiff was in the business of selling and installing motors and was supposed to be familiar with this work. The defendant was not familiar with the installing of motors. His business had already been wired and it was the duty of plaintiff to know before he sold the motor that the building was in proper condition for the installation of the motor. If other wiring were necessary, it seems obvious that this should have been brought to defendant's attention before the sale was made.

Defendant wanted a stoker to heat his 77-apartment building and this was the job plaintiff contracted to do. In fact plaintiff in its brief says, "The intention of the parties was to install an automatic coal stoker suitable for heating defendant's building." It could not excuse itself after it claimed to have sold the stoker and installed it, by saying that the wiring in defendant's building was improper.

Plaintiff further contends that the contract in question contains express warranties and therefore no implied warranties will be presumed, and that there is no evidence in the record of any breach of the expressed warranties mentioned in the contract. As stated, we think the evidence shows that defendant relied upon plaintiff that the stoker would properly heat his apartment building; otherwise, of course, no contract would have been entered into. Plaintiff knew defendant's purpose in buying the stoker and knew that plaintiff was expected to see that the stoker properly performed the functions it was supposed to perform. In these circumstances we think the law will imply a promise that the stoker would reasonably perform the work intended by both parties. Section 15 of the Uniform Sales Act, chap. 121 A., Cahill's Revised Statutes, provides that "Where the buyer, expressly or by implication, makes known to the seller the particular purpose for which the goods are required, and it appears that the buyer relies on the seller's skill or judgment (whether he be the grower or manufacturer or not), there is an implied warranty that the goods shall be reasonably fit for such purpose." See also Mandel Bros. v. Mulvey, 230 Ill. App. 588.

For the reasons stated we hold that the finding of the trial court is against the manifest weight of the evidence. The judgment of the Municipal court of Chicago will be reversed and

Defendant wanted a check to cash his VV-employment building and this was the job plaintiff contracted to do. In fact plaintiff in the trial says, "The intention of the parties was to install an electric bell which would attract attention for entering defendant's building." It could not excuse itself after it claimed to have said the other and installed it, by saying that the wiring in defendant's building was defective.

Plaintiff further contends that the contract in question contains express warranties and therefore no implied warranties will be presumed, and that there is no evidence in the record of any breach of the express warranties mentioned in the contract. As stated, we think the evidence shows that defendant relied upon plaintiff that the electric bell properly met his requirements and, otherwise, no contract would have been entered into.

Plaintiff knew defendant's purpose in buying the checker and knew that plaintiff was expected to see that the checker properly performed the function it was supposed to perform. In these circumstances we think the law will imply a warranty that the checker would reasonably perform the work intended by both parties. Section 15 of the Uniform Sales Act, which is the basis of the Uniform Commercial Code, states that where the buyer, expressly or by implication, makes known to the seller the particular purpose for which the goods are required, and it appears that the buyer relies on the seller's skill or judgment (whether he be the grower or manufacturer or not), there is an implied warranty that the goods shall be reasonably fit for such purpose." See also Hanley Bros. v. Mulvey, 230 Ill. App. 538.

For the reasons stated we find that the finding of the trial court is against the manifest weight of the evidence. The judgment of the Municipal Court of Chicago will be reversed and

judgment entered in favor of defendant on his set-off of \$148.37 plus \$75 expended by defendant to remove the stoker, making a total of \$223.37.

JUDGMENT REVERSED AND JUDGMENT ENTERED
IN FAVOR OF DEFENDANT ON HIS SET-OFF.

McSurely, P. J., and Matchett, J., concur.

Indignant entered in favor of testimony on his part of \$10,000
 fine was awarded by defendant in favor of the other, making a
 total of \$10,000.

INDIGNANT ENTERED IN FAVOR OF TESTIMONY
 IN FAVOR OF DEFENDANT IN HIS SUIT.

INDIGNANT, \$1,000 and defendant, \$1,000.

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INDIGNANT, \$1,000 and defendant, \$1,000.

INDIGNANT, \$1,000 and defendant, \$1,000.

36417

G. PERCY READ,
Defendant in Error,

vs.

ANNA SILVERMAN.

~~ERROR TO MUNICIPAL COURT
OF CHICAGO.~~

IROQUOIS AUTO INSURANCE UNDERWRITERS,
Plaintiff in Error.

270 I.A. 620⁵

MR. JUSTICE G'CONNOR DELIVERED THE OPINION OF THE COURT.

March 1, 1928, plaintiff brought an action against the defendant to recover \$287 claimed to be due him on account of his automobile having been struck and damaged by defendant's automobile which was being negligently driven by one of her servants. September 18, 1930, there was a jury trial and a verdict and judgment in plaintiff's favor for \$700. November 17, 1930, an execution was issued on the judgment and returned the next day, no part satisfied, the bailiff stating he was unable to find the defendant or any of her property upon which to levy the writ. On the following day, November 19th, an affidavit for a garnishee summons was filed in which the "Iroquois Underwriters, Inc., a corporation," was named as garnishee, and summons issued. On the next day the writ was served on the garnishee. November 25th the named garnishee filed a special appearance. November 28, 1930, an order was entered giving leave to the garnishee to file an "affidavit in support of motion." (What the motion was does not appear.) December 3, 1930, an affidavit was filed by the woman to whom the bailiff delivered the garnishee summons, as shown by his return, by which it was apparently sought to show that the leaving of the summons with her was not proper service.

The next that appears in the record is an affidavit for a garnishee summons filed January 25, 1932, in which the "Iroquois

Auto Insurance Underwriters" is named as garnishee. A summons was issued on the same day and served on the garnishee by the bailiff. February 8, 1932, appears an affidavit made by the person with whom the bailiff left the summons as shown by his return, with the apparent view of showing that the service was not good. On the same day the garnishee, Iroquois Auto Insurance Underwriters filed a special appearance, and on February 9th the following order appears in the record: "Garnishee IROQUOIS AUTO INS. UNDERWRITERS A CORP., answers no funds. Plaintiff contests answer." March 23rd following the garnishee filed an answer in which it set up that it was not indebted to Anna Silverman and had no funds or property in its possession belonging to her. April 15th there was a trial before the court without a jury, on the answer of the garnishee. The court found the issues against the garnishee and assessed the damages at \$710.20. Judgment was entered on the finding and an appeal prayed and allowed to the garnishee. May 13, 1932, the judgment was reduced to \$700. The garnishee filed its appeal bond which was approved and on June 7th its bill of exceptions or stenographic report of the proceedings had on the hearing on the garnishee's answer.

There are a number of irregularities in the record and contentions made by the plaintiff which we think it unnecessary to mention because we base our decision on the merits of the case. The garnishee contends that the affidavit for garnishee summons "is false upon its face by the records of the Court or is shown to be false by evidence presented to the trial Court;" that the execution issued on the judgment against Anna Silverman was re-
after
turned the day/it was issued by order of counsel for plaintiff, and that such a return is unauthorized and does not warrant the court in issuing garnishee summons. The difficulty with this

contention is that it is not borne out by the record. There is nothing in the record to show that the execution was returned by the bailiff on the order of plaintiff's counsel. And the statement by counsel for the garnishee that "The fact is, that no effort to find any property of the defendant is shown to have been made for more than two years before the writ of garnishment under consideration was issued," is also not warranted by the record. The return of the sheriff states that he was unable to find the defendant, Anna Silverman, or any property on which to levy the execution. There is no evidence to the contrary, and we must therefore assume that the bailiff did his duty as shown by his return.

A further contention is made by the garnishee that "Garnishment cannot be based on unliquidated damages." This has been held to be the law but has no application to the facts as disclosed by the record before us because the record here shows that the damages are liquidated, viz., the \$700 judgment rendered in plaintiff's favor against Silverman.

A further point is made that the defendant, Anna Silverman, failed to appear on the trial of the damage suit against her; that her failure was contrary to the express terms of the insurance policy issued to her by the garnishee; and that she could not recover on the insurance policy, consequently plaintiff cannot do so by garnishment. In Schneider v. Allen, 259 Ill. App. 543 (affirmed in 346 Ill. 137) we held that where an automobile insurance policy insuring against liability required the assured to aid the insurance company in securing evidence and procuring attendance of witnesses where a claim is made against the assured, and the assured fails to do so, and a judgment is obtained against him, there being a breach of the insurance policy by the assured the company cannot be garnished by a judgment creditor, although the insurance policy, if the assured

contention is that it is not borne out by the record. There is
nothing in the record to show that the association was retained by
the balliff on the order of the court. And the state-
ment by counsel for the defendant that "The fact is, that an al-
legation of the property of the defendant is shown to have been
made for more than two years before the writ of garnishment was
issued," is also not warranted by the record.
The return of the sheriff states that he was unable to find the
defendant, and that he was unable to find him in any of the
places. There is no evidence to the contrary, and we must
therefore assume that the balliff did not find him as shown by the
return.
A further contention is made by the defendant that "The
return cannot be based on unauthenticated facts." This has been
held to be the law but has no application to the facts as disclosed
by the record before us because the record does show that the
return is authenticated, viz., the 17th judgment returned in plain-
tiff's favor against defendant.
A further point is made that the defendant, when returned,
failed to appear on the trial of the writ of garnishment; that
the return was contrary to the return of the defendant being
issued to her by the defendant; and that she could not recover on
the insurance policy. In Wheeler v. Allen, 200 Ill. App. 2d (1915) in 240
Ill. (1917) it was held that where an automobile insurance policy provided
that liability required the insured to give the insurance company
in writing evidence and procuring attendance of witnesses there
to be made against the insured, and the insured failed to do so,
and a judgment is obtained against him, there being a breach of the
policy by the insured the company cannot be reimbursed by
a judgment creditor, although the insurance policy, if the insured

had lived up to its provisions, would cover plaintiff's claim. In that case Allen, who had an automobile insurance policy, injured plaintiff who brought suit against him. The insurance company took charge of the defense of the case, as the policy provided, but Allen, who was the only witness and the only one who knew about the case, refused to help the insurance company or to attend the trial. We held this breached the policy and the plaintiff, who had obtained a judgment against Allen growing out of an automobile accident, could not maintain garnishment against the insurance company. This holding was affirmed by the Supreme court.

In the instant case the record discloses that the defendant Anna Silverman, owned an automobile covered by an insurance policy issued by the garnishee. The automobile was used by her in her business and was being driven by her son at the time plaintiff's automobile was damaged as a result of the collision occasioned by the negligence of the driver. The son died before the trial. His mother, the defendant, was not present at the time of the accident and knew nothing of how it occurred. On the hearing of the garnishment proceeding there was evidence to the effect that on the hearing of the damage case several witnesses testified that Mrs. Silverman had admitted to them that her son, who was driving her car at the time of the collision, was using it for her business at that time. When the damage case went to trial counsel for the garnishee represented ~~that~~ the defendant, Anna Silverman, and at the close of plaintiff's case, counsel for defendant, who represented the insurance company, discovered that Mrs. Silverman was not in court and then attempted to withdraw from the case, but the court would not permit it. There was no suggestion that Mrs. Silverman would have been able to testify to anything, or to have rendered any service to the insurance company, that would have been of any value in defending the damage case. The evidence further

had lived as to the provisions, would cover Alcala's claim, in that case Alcala, who had no reasonable insurance policy, insured Alcala who brought suit against him. The insurance company took charge of the defense of the case, as the policy provided, and Alcala, who was the only witness and the only one who knew what the case, refused to help the insurance company or to attend the trial. He held this prevented the policy and the Alcala's, who had at- tained a judgment against Alcala giving out of an Alcala's case, could not receive judgment against the insurance company. This judgment was affirmed by the Federal court. In the Federal case the court determined that the insurance policy was Alcala's, and no Alcala's company or an insurance policy issued by the insurance. The Alcala's was not in the business and was being driven by her son at the time Alcala's automobile was damaged as a result of the collision mentioned by the negligence of the driver. The son also had a trial. His mother, the defendant, was not present at the trial of the witness and must testify if he is acquitted. On the hearing of the first Alcala's proceeding there was evidence on the Alcala's that on the evening of the crash there existed witness testimony that Alcala's had admitted to them that her son, who was driving her out of the time of the collision, was using it for her business at that time. When the damage case went to trial because for the Alcala's represented that the defendant, Alcala's, and the Alcala's Alcala's case, against the defendant, was the first for the insurance company, Alcala's was not Alcala's but in fact was Alcala's in Alcala's case the case, but the court would not admit it. There was no suggestion that the Alcala's would have this in Alcala's in Alcala's, as to have Alcala's was applied to the insurance company, that would have been at up time in Alcala's the Alcala's case. The Alcala's Alcala's

shows that at the time of the collision Mrs. Silverman lived in Chicago, and that counsel representing her and the Insurance company communicated with her. The case was continued from time to time and counsel advised her every time the case was to be tried, by writing her. But afterwards Mrs. Silverman went to Rock Island and correspondence was had between her and the garnishee's counsel about the case. May 24, 1930, she wrote from Rock Island to counsel, stating that her son, who was involved in the accident, had died; that her health was bad and that she could not come to Chicago for the trial until August 1, 1930. May 31, 1930, she again wrote from the same place to counsel, acknowledging a letter from him and stating that she would be at counsel's office September 18, 1930. The counsel who then represented Mrs. Silverman testified that he had a conversation with her at his office about July 1, 1930; that she was trying to make arrangements to go to an old people's home but assured him she would be at the trial on September 18th; that he wrote her a letter September 15th, which he addressed to her Chicago address and also to Rock Island, telling her the case was set for trial on the 18th; that Mrs. Silverman did not come to his office September 18th, and after plaintiff's testimony was all in he discovered that Mrs. Silverman was not in the court room, and he then asked leave to withdraw, which leave was denied; he testified that on the trial of the damage case, "We didn't offer any testimony because we didn't have any. Mrs. Anna Silverman was the only witness;" that he did not cross-examine any of the witnesses or argue the case to the jury.

We think the facts, as above stated, do not bring this case within the rule laid down in the Schneider case. In the Schneider case the assured, who was the defendant, knew all about the accident and was the only witness the Insurance company could produce, but

... at the time of the accident, Mr. Silverman lived in Chicago, and that counsel represented her and the Insurance company communicated with her. The case was continued from time to time and counsel advised her every time the case was to be tried, by writing her. But afterwards Mr. Silverman went to New Orleans and correspondence was had between her and her husband's counsel about the case. May 24, 1930, she wrote from New Orleans to counsel, stating that her son, who was involved in the accident, had died; that her health was bad and that she could not come to Chicago for the trial until August 1, 1930. May 31, 1930, she again wrote from the same place to counsel, acknowledging a letter from him and stating that she would be at counsel's office September 12, 1930. The counsel who then represented Mrs. Silverman testified that he had a conversation with her at his office about July 1, 1930, that she was trying to make arrangements to go to his office's home but assured him she would be at the trial on September 12th; that he wrote her a letter August 1st, when he advised her that Chicago address was not also to New Orleans, telling her the case was set for trial on the 12th; that Mrs. Silverman did not come to his office September 12th, and after his wife's testimony was all in he discussed with Mrs. Silverman was not in the next room, and he had left home at 11:00, when there was no trial on September 12th on the trial of the damage case, "the claim" after my testimony because we didn't have any. Mrs. Anna Silverman was the only witness; that he did not cross-examine any of the witnesses or argue the case to the jury.

We think the facts, as above stated, do not bring this case within the rule laid down in the Schneider case. In the Schneider case the deceased, who was the defendant, knew all about the accident and was the only witness the Insurance company could produce, but

in the instant case all the evidence showed that the assured, Mrs. Silverman, knew nothing about the case and there is no showing that she could have been of any assistance to the Insurance company in any way.

The judgment of the Municipal court of Chicago is affirmed.

AFFIRMED.

McSurely, P. J., and Hatchett, J., concur.

36475

THE PEOPLE OF THE STATE OF
ILLINOIS,

Defendant in Error,

vs.

JOSEPH MOCH,
Plaintiff in Error.

ERROR TO MUNICIPAL COURT
OF CHICAGO.

270 I.A. 621¹

MR. JUSTICE O'CONNOR DELIVERED THE OPINION OF THE COURT.

On August 13, 1932, defendant was arrested and an information filed charging that on July 31, 1932, the defendant, in the City of Chicago carried a revolver concealed on or about his person. A plea of not guilty was entered, a jury waived, the cause tried by the court, and after hearing the court found defendant guilty and sentenced him to confinement in the county jail for a term of six months. Defendant prosecutes this writ of error.

The evidence produced on the hearing is shown in the bill of exceptions in narrative form and is very brief, from which it appears that John Giak, called by the People, testified that he was a police officer residing at No. 4792 Archer avenue, Chicago, and was attached to the 19th District; that shortly after noon on July 21, 1932, while he was on his way home from the 19th District, he saw defendant, who was across the street in front of 4787 Archer avenue; that defendant was looking backwards, that his hands, face and clothes were smeared with blood and that he held in the palm of his right hand a 25 Automatic Colt, which defendant handed over to witness whom he recognized as a police officer; that the officer asked him what he was doing with the gun and defendant replied, "They tried to hold me up." "I just shot a man in self-defense, and I carried the gun for protection." The defendant testified that he handed the gun to the police officer whom he recognized and "that the gun was always in his hand." This is all the evidence in the record, and following the evidence in

THE PEOPLE OF THE STATE OF
ILLINOIS,
COUNTY OF COOK,

vs.

Defendant in Error.

270 I.A. 621

BEFORE THE COURT, THE COURT HAS HEARD THE EVIDENCE OF THE WITNESSES.

On August 12, 1932, defendant was arrested and an information was filed charging that on July 21, 1932, the defendant, in the City of Chicago, carried a revolver concealed on or about his person. A plea of not guilty was entered, a jury waived, the case tried by the court, and after hearing the court found defendant guilty and sentenced him to confinement in the county jail for a term of six months. Defendant prosecutes this writ of error. The evidence produced on the hearing is shown in the bill of exceptions in narrative form and is very brief. From which it appears that John Alan, called by the People, testified that he was a police officer residing at 121 West Adams Street, Chicago, and was attached to the 19th District; that shortly after noon on July 21, 1932, while he was on his way home from the 19th District, he saw defendant, who was across the street in front of 4737 Archer Avenue; that defendant was looking backward, that his hands, face and clothes were covered with blood and that he held in the palm of his right hand a 38 Automatic Colt, which defendant handed over to witness whom he recognized as a police officer; that the officer asked him whether he was going with the gun and defendant replied, "They tried to hold me up." "I just shot a man in self-defense, and I carried the gun for protection." The defendant testified that he handed the gun to the police officer whom he recognized and "that the gun was always in his hand." This is all the evidence in the record, and following the evidence is

the bill of exceptions, the court certifies "the following propositions of law to the Appellate court and answers same in the affirmative:

"1. Can a Court find the defendant guilty of carrying concealed weapons if from all the circumstances and evidence in the case it is logical to presume that the defendant had a gun concealed on or about his person immediately before his arrest or at any time on the day the defendant is charged with carrying concealed weapons?

"2. Can the Officer without seeing the gun concealed on the person of the defendant or without any reasonable or probable cause search and arrest a defendant for carrying concealed weapons?"

We do not understand it is the proper practice to submit propositions of law in a criminal case. Sec. 61 of the Practice act, which has to do with propositions of law, applies only to civil cases where a jury has been waived by the parties. But in any view of the case, we think the propositions were not applicable to the facts as disclosed by the evidence, and therefore were improper to submit to the trial court. The first proposition is: Could the court legally find the defendant guilty of carrying concealed weapons if from all the evidence it was logical to presume that the defendant had "a gun concealed on or about his person immediately before his arrest or at any time on the day defendant" was arrested. And the second proposition was, in effect, whether the officer, without seeing the gun concealed on the person of the defendant, or without any reasonable or probable cause, believing he was carrying a concealed weapon, could search and arrest him.

We think the evidence shows that the gun was not concealed by the defendant at the time he was arrested because the evidence is that defendant had the gun in his hand at the time he was arrested. There is no evidence whatever that it was concealed.

the bill of exceptions, the court certified "the following propo-

sitions of law to the appellate court and answers same in the

affirmative:

"1. Was a person liable for negligent liability of carrying con-

cealed weapons if from all the circumstances and evidence in the

case it is logical to presume that the defendant had a gun con-

cealed on or about his person immediately before his arrest or

at any time on the day the defendant is charged with carrying con-

cealed weapons?

"2. Can the officer without seeing the gun concealed on the

person of the defendant or without any reasonable or probable cause

search and arrest a defendant for carrying concealed weapons?

We do not understand it to be the proper question to submit

propositions of law in a criminal case. Sec. 81 of the Practice

act, which has to do with propositions of law, applies only to

civil cases where a jury has been waived by the parties. But in

any case of the kind, as in the propositions here set forth,

to the facts as disclosed by the evidence, and therefore were im-

proper to submit to the trial court. The first proposition is:

Could the court legally find the defendant guilty of carrying con-

cealed weapons if from all the evidence it was logical to presume

that the defendant had a gun concealed on or about his person im-

mediately before his arrest or at any time on the day defendant?

was answered. But the second proposition was, in effect, whether

the officer, without seeing the gun concealed on the person of the

defendant, or without any reasonable or probable cause, could

he was carrying a concealed weapon, could search and arrest him.

To submit the evidence alone that the gun was not concealed

by the defendant at the time he was arrested because the officer

he had defendant had the gun in his hand at the time he was ar-

rested. There is no evidence whatever that it was concealed.

The officer testified that the defendant had the gun that he handed over to the officer in the palm of his right hand.

Holding as we do that the evidence shows the weapon was not concealed, the two questions are not pertinent in any view of the law. Since we hold that all the evidence shows the weapon was not concealed on the person of defendant, and the judgment must be reversed for that reason, it is unnecessary to consider the contention that the venue was not sufficiently proven.

The judgment of the Municipal court of Chicago is reversed.

JUDGMENT REVERSED.

McSurely, P. J., and Matchett, J., concur.

The witness testified that the defendant was the first to
be seen in the room in the palm of his right hand.
Believing as we do that the evidence about the witness

was not convincing, the two questions are not pertinent to
any case in the law. Since we hold that all the witness knew
the witness was not concealed on the person of defendant, the
evidence must be reversed for that reason, it is unnecessary
to consider the contention that the venue was not established.

The judgment of the Municipal Court of Chicago is

JUDGMENT REVERSED.

REVERSED, 7-11-1911, 111 N.E. 2d 1000.

36241

FANNIE ROBERSON,
Appellee,

v.

HUGO F. TOEPFER,
Appellant.

APPEAL FROM SUPERIOR COURT,
COOK COUNTY.

270 I.A. 621²

MR. PRESIDING JUSTICE SCANLAN DELIVERED THE OPINION OF THE COURT.

Plaintiff sued defendant in case. A jury returned a verdict finding defendant guilty and assessing plaintiff's damages at the sum of \$7,000. The court required a remittitur of \$1,000, which plaintiff entered, and thereupon judgment was entered for \$6,000. Defendant has appealed.

Plaintiff's theory of fact is that she was struck by an automobile operated by defendant while she was standing on State street, at or near 40th street, waiting to board a northbound State street car; that while she was so standing, about three or four feet east of the northbound street car track, the street car arrived and stopped alongside of her, but that before she had time to board the car the automobile of defendant came from behind the standing street car, without any warning, and struck her, causing the injuries for which she sued. The accident occurred about seven o'clock p. m. It is conceded that there is a sign at the corner in question to indicate that it is a stopping place for northbound street cars. Defendant's theory of fact is that he observed the northbound street car was making a stop at the said corner and he thereupon slowed down his automobile but that before it reached the street car the latter started again, and that thereupon he then started to pass the car on the right, or east, side; that the street car had gone some distance when plaintiff

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Witnesses were interviewed in regard to the accident. A witness explained a possible landing defendant might have made and suggested defendant's damages of \$10,000. The court recommended judgment of \$10,000, which defendant entered, and thereupon judgment was entered for \$10,000. Defendant has appealed.

Plaintiff's theory of fact is that she was struck by an automobile operated by defendant while she was standing on State Street, at or near State Street, which is State Street. State Street says that while she was standing, about three or four feet east of the northbound street car track, the street car arrived and stopped alongside of her, but that before she had time to board the car the automobile of defendant came from behind the standing street car, without any warning, and struck her, causing the injuries for which she sues. The accident occurred about seven o'clock p. m. It is conceded that there is a sign at the corner in question to indicate that it is a stopping place for northbound street cars. Defendant's theory of fact is that he observed the northbound street car was making a stop at the said corner and he thereupon allowed down his automobile but that before it reached the street car the latter started again, and that thereupon he then started to pass the car on the right, or east, also; that the street car had gone some distance when plaintiff

ran eastward, passed in front of the street car, and directly in the path of the automobile, which was going north at the time, and that defendant did not have time to stop his automobile before it struck plaintiff.

Defendant does not claim that plaintiff did not make out a prima facie case, but he argues that "there was a sharp conflict as to these two contentions, there being several witnesses for each side, including the motorman and conductor of the street car who were witnesses for the defendant. This conflict of contentions becomes important not only on the question of the weight of the evidence, but also on questions of instructions and misconduct of plaintiff's counsel, as will be hereinafter pointed out." Defendant contends that the trial court erred in not granting defendant's motion for a new trial because "the verdict is against the manifest weight of the evidence on the questions of the defendant's negligence and the plaintiff's contributory negligence." After a careful consideration of the entire evidence bearing upon this contention we have reached the conclusion that we would not be justified in sustaining the contention.

Defendant contends that the giving of plaintiff's instruction number one was reversible error. The pertinent parts of the instruction are as follows:

"The Court instructs the jury that the plaintiff has averred in the first count of her declaration that on the 1st day of January 1929, the defendant was the owner of an automobile which he was controlling and operating in a northerly direction upon and along South State Street, at and near to 40th Street, public highways in the City of Chicago, Illinois.

"And plaintiff has further averred that on said date, and while she was upon said South State street, at and near to said 40th Street, and while she was then and there in the exercise of ordinary care and caution for her own safety, the defendant so carelessly and negligently drove, controlled, managed and operated his said automobile, that as a direct result thereof, the said automobile ran upon, against and struck the plaintiff * * *."

Defendant contends that the vicious part of the instruction is contained

in the second paragraph, and his argument is that the instruction limits the due care required of plaintiff to the time of the injury and disregards her conduct just prior to the injury; that defendant introduced evidence tending to prove that plaintiff ran in front of the moving street car and thereby placed herself, through her own negligence, in a place of danger. We do not think defendant's interpretation of the words of the instruction is justified. If the words in question be given a reasonable construction it is plain that they do not limit the due care required of plaintiff to the exact time of the injury. The instruction, if reasonably interpreted, required plaintiff to be in the exercise of ordinary care and caution for her own safety "while she was upon said South State street." She was upon said street from the moment that she left the curb on the west side of the street until the time of the accident. Contentions akin to that raised by defendant are not new. In the celebrated case of C. & A. R. R. Co. v. Fisher, 141 Ill. 614, an instruction complained of contained the following language (p. 624):

"If the jury believe, from the evidence, that the plaintiff, while in the exercise of ordinary care, was injured by or in consequence of the negligence of the defendant, as charged in the declaration or either one of the counts thereof, then you should find the defendant guilty."

The defendant complained that the instruction omitted the requirement of care on the part of plaintiff just prior to the accident, but the Supreme court said (p. 625):

"It is claimed that the instruction requires of the plaintiff the exercise of ordinary care at the particular point of time when the injury was received, only, and omits the requirement of care previous thereto, and thereby excludes from consideration previous acts of negligence materially contributing to the injury. The word 'while' means 'during the time that,' and seems to necessarily imply some degree of continuance. The jury could not reasonably have regarded it otherwise than as referring to the whole series of circumstances involved in the entire transaction. We have on several occasions interpreted the phrase 'at the time,' found in an instruction, as having relation to the entire transaction under examination. (Lake Shore and Michigan Southern Railway Co. v. Johnson, 135 Ill. 641; McKulta v. Lockridge, 137 Id. 270.) The plaintiff was crowded off

In the second paragraph, and his argument is that the instructions limit the due care required of Plaintiff to the time of the injury and that the instructions do not require that Plaintiff be in a position of imminent peril at the time of the injury. The instructions do not require that Plaintiff be in a position of imminent peril at the time of the injury.

The instructions do not require that Plaintiff be in a position of imminent peril at the time of the injury. The instructions do not require that Plaintiff be in a position of imminent peril at the time of the injury. The instructions do not require that Plaintiff be in a position of imminent peril at the time of the injury.

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or unavoidably fell off of the car while he was standing on its platform or steps. If his being in that place was not, under the circumstances, the exercise of ordinary care, then he was not injured 'while in the exercise of ordinary care,' as required by the instruction as a condition precedent to a right of recovery, and so the instruction is broad enough to include the supposed contributory negligence that it is claimed is excluded by it. But if there be any defect in the instruction in this regard, it is most amply cured by the ninth instruction for appellee, and in instructions 5, 9, 12, 19, 20, 21, 23, 24, 26, 27, 28, 29 and 30 given for appellant." (*Italics ours.*)

In Lake Shore & Michigan Southern Ry. Co. v. Johnson, 135 Ill. 641, 652-3, the court said:

"It is also said, that the instruction confined the attention of the jury to the question whether or not the plaintiff was in the exercise of due care at the precise moment, or punctum temporis, when the cars struck him. This is hypercriticism. The words, 'at the time,' as used in the instruction, refer to the whole transaction, or series of circumstances, from the time plaintiff reached the tracks to the time when he was injured, leaving it to the jury to determine whether he used due care before he stepped upon the unoccupied track and while he stood there. If this were not so, the defect was cured by several of the defendant's instructions, which required the jury to find that plaintiff was exercising due care both before and at the time of the accident, both while he was on the track and before he went upon it." (See also Louthan v. Chicago City Ry. Co., 198 Ill. App. 329, 334-5.)

In Kinney v. Village of Harlem, 167 Ill. App. 35, 36, the court said:

"The first instruction given at the instance of appellee is not subject to the criticism urged. The declaration alleges that appellee was in the exercise of due care while passing on and upon the walk. The requirement in the instruction that appellee should have been in the exercise of due care at the time of the accident, and as charged in the declaration, did not limit the necessity of the exercise of due care by her within too narrow a compass."

In St. Louis Nat'l Stock Yards v. Godfrey, 198 Ill. 288, 295, the court said:

"The second instruction is criticized by counsel also. They say the rule is, that although the plaintiff may have been in the exercise of ordinary care for his own safety at the time of the injury, still he was not entitled to recover unless he was in the exercise of ordinary care to foresee and avoid danger before the accident. They contend the instruction limits the time the plaintiff was required to use due care to the moment when he was injured. This interpretation of the expression, 'while he was in the exercise of ordinary care for his own safety,' is too narrow. The same contention was passed on adversely to appellant's contention in Chicago and Alton Railroad Co. v. Fisher, 141 Ill. 614. The words have reference to the whole transaction. (Lake Shore and Michigan Southern Railway Co. v. Guska, 161 Ill. 232.) Besides, the third instruction required the jury to find that the plaintiff

exercised ordinary care for his own safety before and at the time of the occurrence of the injury." (*Italics ours.*) (See also Hornung v. Decatur Ry. Co., 241 Ill. 128, 130; North Shore St. Ry. Co. v. Strathmann, 213 Ill. 252, 253; Knox v. American Rolling Mill, 236 Ill. 437, 441; Peterson v. Chicago Traction Co., 231 Ill. 324, 328; C. & C. v. St. L. Ry. Co. v. Keenan, 190 Ill. 217, 219; L. & N. Ry. Co. v. Ouska, Idem., 151 Ill. 232, 233; Butters v. Chicago, Burlington & Quincy Ry. Co., 157 Ill. App. 369, 374; C. & A. Ry. Co. v. Harrington, 192 Ill. 9, 35; Watts v. Wabash Ry. Co., 219 Ill. App. 549, 556.)

Defendant cites, in support of his contention, Village of Lockport v. Licht, 221 Ill. 35; Krieger v. A. E. & C. R. E. Co., 242 Ill. 544; Bale v. Chicago Junction Ry. Co., 259 Ill. 476, but these cases are readily distinguishable from the instant one. In the instant case the first count of the declaration alleges, in substance, that plaintiff was in the exercise of ordinary care and caution for her own safety "while she was upon said State street," and as we have heretofore stated, if the language in question is reasonably interpreted it required ordinary care and caution on the part of plaintiff from the time she left the sidewalk on the west side of State street until the moment of the accident, and the alleged lack of care on her part all took place during the time "while she was upon said State street." Plaintiff's instruction number twenty required her to be in the exercise of ordinary care "at the time of and prior to the accident in question." In none of defendant's three instructions that bear upon the question as to the care required of plaintiff is there a provision as to the care required of plaintiff just prior to the accident. In number three the language is, "and also to prove that the plaintiff herself was in the exercise of ordinary care for her own safety." In number thirteen the language is, "and if the jury believe from the evidence that the plaintiff failed to exercise ordinary care for her own safety, which failure, if any, proximately helped in any way to bring about the accident * * *." In number eighteen the language is: "The jury are instructed that the plaintiff cannot recover in this case * * * unless they find she has a preponderance of the evidence supporting the following propositions:

First, That the plaintiff was not at the time of the accident in question guilty of any failure to exercise ordinary care for her own safety, proximately contributing to her own injury * * *," Under this state of the record, it is hardly consistent, to say the least, for defendant to claim that the second paragraph of plaintiff's instruction number one is "vicious."

Defendant contends that the court erred in giving plaintiff's instruction number two to the jury. It reads as follows:

"The court instructs the jury that on January 1, 1929, there was in full force and effect in the State of Illinois a statute of the State of Illinois as follows: 'In approaching or passing a street railway car, which has been stopped for the purpose of receiving or discharging passengers, the operator of every motor vehicle or motor bicycle shall not drive such vehicle or bicycle within ten feet of the running board or lowest step of such car, except by the express direction of a traffic officer.'"

There is no merit in this contention. There is evidence to the effect that the automobile of defendant, at the time of the accident, passed the standing street car on the east side thereof and within from two to ten feet of it. It has been repeatedly held that it is not error to give an instruction in the substantial language of the statute. In Ward v. Meredith, 220 Ill. 66, 68, the court said:

"We have held in many cases that no error is committed by giving an instruction in the substantial language of a statute; that the instruction must be regarded as sufficient when it lays down a rule in the words of the law itself. Kellyville Coal Co. v. Strine, 217 Ill. 516; Dunk Bros. Coal and Coke Co. v. Peton, 192 id. 41; Mount Olive Coal Co. v. Rademacher, 190 id. 538; Duncan v. People, 134 id. 110." (See Union Bank of Chicago, Adm. v. Hoey, 265 Ill. App. 610 (Abat.)

In Leideck v. City of Chicago, 248 Ill. App. 545, it is said (p. 555):

"Defendant contends that instructions Nos. 8 and 9 should not have been given. Instruction No. 8 reads:

"The statute of the State of Illinois provides that any person operating a motor vehicle on a public highway, shall, on overtaking any other vehicle, pass on the left side thereof."

"The instruction is a partial recital of section 40 of the Motor Vehicle Act, Cahill's St. Ch. 95a, par. 41. The instruction certainly was pertinent because it was in evidence that

Witness that the plaintiff was not at the time of the accident in
question calling at my office to consult with me, but that
she was actually proceeding to her own home at the time
that this claim of the plaintiff is so heavily emphasized, as my
the fact, the defendant is clear that the accident occurred at

plaintiff's residence as is stated.

Defendant contends that the accident occurred in Illinois.

Illinois' jurisdiction number two is the jury. It reads as follows:

"The court instructs the jury that on January 14, 1929,
there was an auto accident in the State of Illinois. It is requested
that the State of Illinois be held liable for the damages
suffered by the plaintiff. The court further instructs the jury
that the plaintiff is entitled to recover the damages
suffered by her as a result of the accident. The court further
instructs the jury that the defendant is liable for the damages
suffered by the plaintiff as a result of the accident."

There is no merit in this contention. There is evidence to the

effect that the automobile of defendant at the time of the

accident, passed the standing street car on the west side street

and within five feet of the car. It has been repeatedly

held that it is not error to give an instruction in the substantial

language of the statute. In People v. McLaughlin, 200 Ill. 22, 23.

the court said:

"The issue in this case is whether or not the plaintiff is entitled
to recover damages for the injuries sustained by her as a result
of the accident. The court further instructs the jury that the
plaintiff is entitled to recover the damages suffered by her as a
result of the accident. The court further instructs the jury that
the defendant is liable for the damages suffered by the plaintiff
as a result of the accident. The court further instructs the jury
that the plaintiff is entitled to recover the damages suffered by
her as a result of the accident. The court further instructs the
jury that the defendant is liable for the damages suffered by the
plaintiff as a result of the accident."

In People v. City of Chicago, 200 Ill. 22, 23, it is said (p.

22):

"Instruction number three instructs the jury that the plaintiff
is entitled to recover the damages suffered by her as a result of
the accident. Instruction No. 3 reads:

"The statute of the State of Illinois provides that any
person operating a motor vehicle on a public highway shall be
liable for the damages suffered by any other vehicle, person or
property as a result of the accident."

"The instruction is a partial recital of section 40 of
the Motor Vehicle Act, Chapter 120, Ill. Stat., and the instruction
is not erroneous because it was in substance that

Demmett passed to the right of the Tennison car when he should have passed to the left. It is also argued that the instruction is not based on any count in the declaration. It would be proper to give such an instruction where the declaration charges negligence generally, as several of the counts in the declaration in the instant case do. That was the negligent driving of the car, because it was in violation of the method prescribed by the statute. Furthermore it was not necessary to plead the statute, but only facts which brought the violation counted upon within the statute. Chicago & A. R. Co. v. Dillon, 123 Ill. 570."

The statute, ch. 51, pars. 57 & 58, Cahill's Ill. Rev. St., provides that all courts of original jurisdiction shall take judicial notice of "all laws of a public nature enacted by any state or territory of the United States." Defendant contends that the instruction "is abstract, misleading, argumentative, draws attention to a particular state of facts and there was no count in the declaration to support it." Plaintiff was not required to plead the statute, but only facts which brought the violation counted upon within the statute, and, as we have heretofore stated, there was evidence tending to prove a violation of the statute, and the declaration alleged sufficient facts to bring the violation within the statute. The case cited in support of defendant's contention, Stamas v. Gaskow, 250 Ill. App. 364, is readily distinguishable from the instant one.

Defendant contends that the court erred in giving plaintiff's instruction number nine to the jury, which reads as follows:

"If, under the evidence and under the instructions of the Court, the jury find the issues for the plaintiff and that the plaintiff has sustained damages by reason of physical pain and suffering undergone by her as a natural, direct and proximate result of the negligence of the defendant, as charged in plaintiff's declaration, then to enable the jury to estimate the amount of such damages, so caused by physical pain and suffering, it is not necessary that any witness should have expressed an opinion as to the amount of such damages, but the jurors may make such estimate from the facts and circumstances proved from the evidence, and by considering them in connection with their knowledge, observation and experience in the affairs of life."

The argument of defendant is that this instruction "permits the jury to find the issues for the plaintiff under the evidence, instead of requiring her to prove her case by a preponderance of the evidence." Defendant concedes, as he must, that it is an

instruction that relates only to the question of damages, but argues that it is misleading and inaccurate. The contention is without the slightest merit. The instruction is a standard one and has been repeatedly approved. See Thompson v. Northern Hotel Co., 256 Ill. 77, 86-7; North Chicago St. E. R. Co. v. Fitzgibbons, 180 Ill. 466, 469; Richardson v. Nelson, 221 Ill. 254, 258; Keokuk Bridge Co. v. Vetsel, 228 Ill. 253, 259; Pirtle v. Gray et al., 202 Ill. App. 601, and City of Litchfield v. Whitenack, 78 Ill. App. 364, 366-7, wherein the court held that "this instruction is the law, and has been frequently so held by this and the Supreme Court." See also the case of C. & C. I. E. R. Co. v. Cleminger, 77 Ill. App. 186, wherein the court said (p. 188):

"It is objected that this instruction is faulty in that it uses the word 'evidence' instead of the term 'preponderance of evidence.' * * *

"We regard the objection as fanciful rather than substantial. The word 'evidence,' as here used, could, in reasonable interpretation, mean nothing less than all the evidence. The jury were instructed as to determining what constituted a preponderance of the evidence in the tenth instruction given at request of appellants; and in the eleventh of appellants' instructions the word 'evidence' is used as it is in the instruction complained of, i.e., without the qualifying word 'preponderance.'"

By plaintiff's instruction number seven the jury were told that plaintiff was obliged to prove, by a preponderance of the evidence, her damages, if any; and by defendant's instruction number eleven the jury were told that with respect to the ailments and disabilities claimed by plaintiff the burden of proof was upon her to show by a preponderance of the evidence not only that such ailments really existed or exist, but that the ailments and disabilities are the result of the accident in question, and that the burden of proof was not upon defendant to show that such ailments did not proceed or arise from any other cause.

Defendant contends that counsel for plaintiff was guilty of improper and prejudicial conduct in intimating, during his

cross-examination of Brown, the motorman, that the witness "was telling on the stand a different story than he had told counsel." In support of this contention defendant cites the following from the record, which is part of the cross-examination of Brown: "Q. (By Mr. Kay, attorney for plaintiff): And the story you are telling here now is a little different than the story you told me? Mr. Gillespie (Attorney for appellant): I object to that. Mr. Kay: Objection to what? Mr. Gillespie: I object to your statement. Ask him what he told you, that is the proper way. Mr. Kay: Please let me make my statement. Mr. Gillespie: I object to any of your statements to the witness. The Court. I was wondering what counsel's idea was, - if he wanted to make himself a witness. Mr. Gillespie: That is what I want to find out. Mr. Kay: Q. What kind of a night was this? A. A clear night, to my recollection." The above is principally a colloquy between counsel. Defendant did not require the court to rule upon the question objected to, and the only statement made by the court was, to say the least, not harmful to defendant. The witness was not even required to answer the question, and the objection made to it was not that it was a prejudicial question but that it was not the "proper way" to bring out what the witness had stated to counsel for plaintiff. We are not disposed to hold that the question, asked upon cross-examination, was not a proper one, but, in any event, the argument that defendant was prejudiced by what occurred is without the slightest merit. Defendant argues that he was prejudiced by the fact that plaintiff's counsel, in his closing argument, referred to plaintiff as "this poor woman." It is a sufficient answer to this contention to say that defendant made no objection to any part of the argument, and in view of the fact that counsel for defendant is an able one, it is plain that the instant contention is merely an afterthought.

cross-examination of Brown, the witness, that the witness "was
sitting on the stand a different way than he had said counsel."
In support of this position counsel cited the following from
the record, which is part of the cross-examination of Brown: "Q.
(By Mr. May, attorney for defendant): And the way you are
telling now was in a little different than the way you told
now, Mr. Williams (Attorney for appellant): I object to that.
Q. Now, Williams is with Mr. Williams; I object to your
statement. Ask him what he told you, that is the proper way.
Mr. May: Please let me make my statement. Mr. Williams: I
object to any of your statements as the witness. The Court: I
was wondering what counsel's idea was. - If he wanted to make
himself a witness. Mr. Williams: That is what I want to him
out. Mr. May: Q. This kind of a right was that A. A right
right, to my recollection." The above is substantially a colloquy
between counsel. Between the two parties the court is told
from the question asked at the only statement made by
the court was, to say the least, not material to defendant. The
witness was not even required to answer the question, and the
objection made to it was not that it was a prejudicial question
but that it was not the "proper way" to bring out what the witness
had stated in counsel for defendant. He was not disposed to help
him the question, asked upon cross-examination, was not a proper
one, but, in any event, the argument that defendant was prejudiced
by what occurred in witness the witness's mind. Defendant argues
that he was prejudiced by the fact that Williams's counsel, in
his closing argument, referred to Williams as "this poor man."
It is a sufficient answer to this contention to say that defendant
made no objection to any part of the argument, and in view of the
fact that counsel for defendant is on this one, is the plain fact
that this contention is merely an afterthought.

Defendant has had a fair and impartial trial, and the judgment of the Superior court of Cook county should be and it is affirmed.

AFFIRMED.

Gridley and Sullivan, JJ., concur.

reference has been made to the fact that the

document of the Republic, dated 17th January 1914, is the

is attached.

17th January 1914.

Very truly yours,
 Sir,

36257

47 A

ALICE C. WILSON,
Appellee,

v.

ARTHUR B. HOPPKIMER,
Appellant.

APPEAL FROM CIRCUIT COURT,

COOK COUNTY,

270 I.A. 621³

MR. PRESIDING JUSTICE SCANLAN DELIVERED THE OPINION OF THE COURT.

Plaintiff filed an action in case against defendant. There was a trial before the court, with a jury, and a verdict was returned finding defendant guilty and assessing plaintiff's damages at \$7,500. Plaintiff entered a remittitur of \$2,000 and judgment was entered for \$5,500. Defendant has appealed.

The case seems to have been tried by the presiding judge ably and fairly, for the sole ground urged in support of this appeal is that "the verdict and judgment are excessive." Defendant contends that "the judgment should be reversed and the defendant given a new trial or that the plaintiff should be required to enter a remittitur of at least half the amount of this judgment." Plaintiff contends that "the question of the alleged excessiveness of the judgment is not subject to review in this court, since such question was not included in defendant's motion for a new trial, nor is it assigned as error in this court." In the lower court defendant filed a written motion for a new trial, and the only ground therein assigned which relates in any way to the amount of the damages awarded by the jury is, "9. The verdict is grossly excessive." Upon a consideration of defendant's motion for a new trial the trial court held that the amount awarded was excessive and required plaintiff to enter a remittitur

WILLIAM B. ALLEN,
Appellant,
v.
WILLIAM B. HARRINGTON,
Appellee.

APPEAL FROM CIRCUIT COURT,

DEER COUNTY.

270 I.A. 621

MR. JUSTICE JUSTICE ROBERT HARRINGTON THE OPINION OF THE COURT.

Plaintiff filed an action in case against defendant.
There was a trial before the court, with a jury, and a verdict
was returned finding defendant guilty and assessing plaintiff's
damages at \$7,800. Plaintiff entered a remission of \$2,000
and judgment was entered for \$5,800. Defendant has appealed.
The case seems to have been tried by the presiding
judge only and fairly, for the sole ground urged in support of
this appeal is that "the verdict and judgment are excessive."
Defendant contends that "the judgment should be reversed and the
defendant given a new trial so that the plaintiff should be
remitted to recover a remission of at least half the amount of
this judgment." Plaintiff contends that "the question of the
proper remission of the judgment is not subject to review in
this court, since such question was not included in defendant's
motion for a new trial, nor is it assigned as error in this court."
In the lower court defendant filed a motion asking for a new
trial, and the only ground therein assigned which relates in any
way to the amount of the damages awarded by the jury is "2. The
verdict is grossly excessive." Upon a consideration of defendant's
motion for a new trial the trial court held that the amount
awarded was excessive and remitted plaintiff to enter a remission

of \$2,000, which was done. Defendant made no further motion in the trial court and thereupon judgment was entered for \$5,500. In the assignment of errors defendant assigns as error, "9. The verdict is grossly excessive," but he has not assigned as error that the verdict, as reduced, is excessive, nor that the amount of the judgment entered after the remittitur is excessive. In

Pennsylvania Co. v. Purvis, 128 Ill. App. 367, 374, the court said:

"Counsel for defendant contend that the question whether the sum of \$3,000 is excessive is included in the assignment that the court erred in overruling the motion for a new trial. That motion and the reason or grounds for it are in writing, and the only ground at all relating to damages is in these words: 'The damages awarded are excessive,' which can only mean that the assessed sum of \$5,000 was excessive. The court seems to have been of this opinion, as it was on the suggestion of the court, and to prevent another trial, that the plaintiff remitted \$2,000 from the verdict. The court rendered judgment for the remainder, \$3,000. The objection, or ground for a new trial, that the sum of \$5,000 was excessive, was eliminated from the motion by the reduction of the damages to \$3,000, and that ground is not before us for review, and there is no assignment of error which includes the objection that the sum of \$3,000 is excessive. The rule is, that every error relied on must be assigned and specifically pointed out in the assignment, and that an error not so assigned is not reviewable. Berry v. City of Chicago, 192 Ill. 154."

In Coburn v. Moline, E. Moline & Watertown Ry. Co., 149 Ill. App. 132, 145-6, the court said:

"It is contended that the judgment is excessive. The only assignment of error on this subject is that the verdict is excessive. The trial court so held and required a reduction of \$1,000. It is not assigned for error that the judgment for the reduced amount is excessive. The point now made that the judgment is excessive seems not therefore included within the assignment of errors. Penna. Co. v. Purvis, 128 Ill. App. 367."

In Hoefield v. Wabash Railway Co., 214 Ill. App. 353, 358, the court said:

"Finally, it is contended that the damages are excessive. The only error assigned is that the verdict is excessive. A remittitur of \$5,000 was entered. Judgment was then rendered for \$15,000 and there is no assignment of error questioning the amount of the judgment. An error, not assigned, is not open to review. Berry v. City of Chicago, 192 Ill. 154 (155)."

As the defendant has made no assignment of error that in any way questions the amount of the judgment, there is merit in the contention of plaintiff. However, we have seen fit to examine carefully

of \$2,000, which was done. Defendant made no further motion in

the trial court and the judgment was entered for \$2,000.

In the assignment of errors defendant assigns no error. The

verdict is grossly excessive," but he has not assigned an error

that the verdict, as reduced, is excessive, nor that the amount of

the judgment entered after the remittitur is excessive. In

International Co. v. City of St. Louis, 104 Ill. 2d 574, 400 S.W.2d 100

"The court for defendant contends that the remittitur motion

the sum of \$2,000 is excessive is included in the assignment of

the court was in error in granting the motion for a new trial. That

motion was the motion of the court for it was in error, and the only

ground of all the other grounds is in error. The court

was in error in granting the motion for a new trial. The court

of \$2,000 was excessive. The court's error is in having been of this

opinion, as it was on the assignment of the court, and to prevent

another trial, that the plaintiff received \$2,000 from the verdict.

The court's judgment for the plaintiff, \$2,000, was excessive, and

it was in error for a new trial, and the sum of \$2,000 was excessive, and

assigned from the motion of the remittitur of the court, and there is no assignment

of error which includes the assignment that the sum of \$2,000 is

excessive. The court is in error in granting the motion for a new trial, and

as assigned in the assignment. International Co. v. City of St. Louis, 104 Ill. 2d 574, 400 S.W.2d 100

In International Co. v. City of St. Louis, 104 Ill. 2d 574, 400 S.W.2d 100

the court said:

"It is contended that the judgment is excessive. The

only assignment of error on this subject is that the verdict is

excessive. The trial court has not received a request of

remittitur. It is not sufficient for error that the judgment for the

plaintiff is excessive. The court has not made the judgment of

the court excessive and therefore included within the assignment of

error. International Co. v. City of St. Louis, 104 Ill. 2d 574, 400 S.W.2d 100

In International Co. v. City of St. Louis, 104 Ill. 2d 574, 400 S.W.2d 100

the court

"Similarly, it is contended that the amount was excessive.

The only error assigned is that the verdict is excessive. A remittitur

of \$2,000 was entered. Judgment was then rendered for \$2,000 and

there is no assignment of error questioning the amount of the judgment.

In error, not assigned, is not open to review. International Co. v. City of St. Louis, 104 Ill. 2d 574, 400 S.W.2d 100

As the defendant has made no assignment of error that in any way

questions the amount of the judgment, there is nothing in this question

of clarity. However, we have seen fit to examine carefully

the evidence bearing upon the alleged injury to plaintiff for the purpose of determining whether justice demands a further reduction in the amount of the judgment. From a reading of the transcript of the evidence we find that defendant did not offer any evidence bearing upon plaintiff's injuries.

The accident happened about noon on January 9, 1931, on Michigan avenue, at the intersection of South Water street. Plaintiff was riding in the front seat of an automobile driven by her husband. Just prior to the accident plaintiff's husband had stopped his car at the street intersection, near a safety island, and while waiting for the traffic lights to change his car was struck in the rear by a much larger and heavier car owned by defendant and driven by his chauffeur, whereby the car in which plaintiff was riding was thrown forward a distance of four or five feet. From the shock of the collision plaintiff's head was snapped violently backward and she bit her tongue. She felt "a terrible snap," and was thrown down. At first she could not move her head. She was immediately taken to a doctor's office where she experienced great pain in her neck, also chills and numbness. The attending physician testified that plaintiff was brought to his office "in a staggering condition," that he made a thorough examination and found symptoms which "indicated some serious injury to the nerves and bones of the neck;" "her complaints were chiefly regarding her neck, pain in the neck, pain upon movement; sensation of paralysis in the left side of her face and sensations of paralysis and numbness in the left arm, and extreme vertigo and headache. She could not stand alone without pitching forward at the time that she came into my office, and as I recollect for several days afterward before she could get about alone. An X-ray examination shows the piece of detached bone of the lateral process just opposite the body of the second cervical vertebra. The companion film to this shows the same condition.

The detached piece of bone is from the left transverse process of the second cervical vertebra. They are neck bones;" "the fracture is simply of the tip of the process, the bone being pulled loose and doesn't mean anything compared to the damage that was done to the sympathetic nervous system; that is the big thing in this case." The doctor further testified that when he examined plaintiff on January 9, he "found a contraction of the left pupil, pallor of the skin over the lower portion of the left face, the left side of the neck, the left arm and the skin of the entire surface of the left arm had the appearance that we get when we are chilled, as goose flesh. There was a paleness in the left arm. There was swelling in the neck just below the back of the skull about a half inch down, in the region right over these bones. This swelling was most prominent on the right side. There was a distinct swelling on the left side in front of the juncture of the second and third cervical vertebrae; there was vertigo, constant dizziness; the blood pressure was very low, around 90; she was suffering from shock, rather thin pulse, low blood pressure and the right pupil was dilated. The left pupil was contracted. I administered stimulants. I gave her strichnia in solution. I had her lie down. I found that she could not lie down without being so dizzy that she was afraid she would vomit, so we supported her head and shoulders somewhat. * * * I kept her in the office until after 6 P. M." From the date of the accident until about April 15 this doctor saw plaintiff very frequently. During this period her condition very gradually improved. He found that she still had partial paralysis of two fingers of the left hand, pain in the radial and ulnar nerves, constant dizziness and vertigo, and a tendency to pitch forward; that one of her most serious injuries related to one eye. The day after the accident her right eye showed some improvement but the condition of the left eye remained

The detached place of bone is from the left mandibular process
of the second cervical vertebra. They are both united. The
fracture is simply of the lip of the process, the bone being
guilted loose and does not mean anything compared to the same time
and space as the epiphyseal surface appears that is the only thing
in this case. The second fracture situated just over the epiphysis
himself on January 6, he found a comminution of the left popliteal
condyle of the tibia over the lower portion of the left knee, the left
side of the neck, the left arm and the side of the chest and
of the left arm had the appearance that we get when we are skinned,
an open flesh. There was a paleness in the left arm. There was
swelling in the neck just below the hook of the scapula about a half
inch down, in the region right over the scapula. This swelling
was not prominent on the right side. There was a distinct swelling
on the left side in front of the junction of the second and third
cervical vertebrae, just over the scapula, swelling distinct, the
blood present was very low, around 60; also was returning from
above, rather thin pale, low blood pressure and the right popliteal
was elevated. The left popliteal was unaltered. I administered
stimulants. I gave her potassium in solution. I had her lie
down. I found that she could not lie down without being so tired
that she could not sleep, so we supported her head and
stimulated her. I kept her in the sitting position
at all times. When the rate of the respiration fell down to 12
beats per minute very frequently. During this period her
condition very gradually improved. We found that she still had
partial paralysis of the right arm and leg, but in the
right and left hands, crossed extension and rotation, and a
weakness in right forearm, but not in her own motion in the
elbow or the wrist. The day after the accident her right arm
showed some improvement but the condition of the left arm remained

unchanged, and had not improved at the time of the trial; that she had "hallucinations of vision due to the injury to the eye and nerves; the wall would appear to come down to a certain level, then have a sharp bend in it such as we get when we look into these ^{trick} mirrors. There was complaint of objects before the eyes, and cloudiness of vision in the left eye. The right eye was influenced sympathetically but cleared up rapidly. The condition of the left eye remains very much the same as regards the pupil reaction today. I gave her iodide sedatives. We gave her diathermy treatments and infrared and ultra violet, and by medication, careful dieting and very careful cooperation to prevent any sudden movement of the head we got along without using a neck splint. My opinion is that this injury not only involved that little fragment of bone which wouldn't be of much consequence in and of itself, but that the main trunk and the superior cervical ganglion on the left side of the sympathetic nervous system was seriously injured. The fracture of the transverse process of the vertebra could, in my opinion, account for the symptoms of paralysis or loss of sensation of the fingers on that side and in fact through the involvement with the sympathetic nerve center. I could not find any other cause in my examination to account for that condition. I made complete blood tests, Wasserman test, a careful urinalysis, and found her to be a perfectly healthy woman, free from any infection or disease which would possibly produce these symptoms. * * * She tires easily and when she is tired this vertigo is more pronounced. The control of the left hand is still impaired; she drops objects involuntarily and when fatigued the left hand gives way. She still suffers from headaches, from a moderate degree of insomnia and the disturbance to the eye nerves has become a definitely established condition; the pupil is thoroughly immobile and constantly contracts under all conditions. * * * The fact that it has persisted now

for over a year, in my opinion that has become a permanent disability. As regards the use of the arm and hand, there is a possibility of some improvement, maybe five or ten per cent, but a certain remnant of that disability will be permanent. The condition of the headache and the symptoms that develop when she is fatigued will probably persist indefinitely. There is nothing at the present time I can do to correct the condition. My charge for services was \$200." There was much further evidence offered by plaintiff in reference to her injuries, but we do not consider it necessary to refer specifically to the same. Plaintiff testified, in part, that she was in good health before the accident, that following it her eyes had crossed, that her left eye was pulled upward and outward and that she was obliged to go to an eye specialist and that he gave her glasses which helped to correct that trouble, but that as soon as she becomes tired that condition again manifests itself. As we have heretofore stated, defendant offered no evidence to controvert the testimony for plaintiff as to the alleged injuries, and there is nothing in the record to suggest that the claim is not an honest one. The contention of defendant that the amount of the judgment is excessive, is without merit.

The judgment of the Circuit court of Cook county will be affirmed.

AFFIRMED.

Gridley and Sullivan, JJ., concur.

for over a year, in my opinion that has become a permanent
disability. As regards the man on the other hand, there is a
possibility of some improvement, though that is far from certain.
A further point of view disability will be permanent. The
condition of the kidneys and the symptoms that develop when the
is certainly will probably persist indefinitely. There is nothing
of the nature that I can do to prevent the condition. Up
though the system was good. There was much to be done
effort of himself in reference to his condition, but he
was unable to do so. It was necessary to take special care of the
disability itself, in fact, that was in fact his only chance.
The condition that following is not good and cannot, that he felt
the need of relief, and however and that the one thing to do so
on the condition was that he gave his whole heart and soul to
prevent this trouble, but that as soon as the disease had taken
control of his condition itself. He was never able to get
relieved either by treatment or otherwise, and he was in the
disability as in the other instance, and that is what is the
ground is what was that the claim is not as stated here. The
condition of the condition that was stated at the time is
obvious, in almost every.

The judgment of the Circuit Court of Cook County will
be affirmed.

ADVISED

Relief not granted. The court.

36267

EDWARD H. MORRIS, Receiver for
Binga State Bank, a corporation,
Appellant,

v.

FOUNTAIN THURMAN,
Appellee.

APPEAL FROM MUNICIPAL
COURT OF CHICAGO.

270 I.A. 621⁴

MR. PRESIDING JUSTICE SCANLAN DELIVERED THE OPINION OF THE COURT.

Plaintiff caused a judgment by confession on a promissory note to be entered against defendant. Afterward the judgment was opened up and defendant given leave to defend. There was a jury trial, which resulted in a verdict and judgment in defendant's favor, and plaintiff appealed. The first division of this court reversed the judgment and remanded the cause for a new trial.

(Morris v. Thurman, 263 Ill. App. 78.) The case was again tried and there was a second jury trial which resulted in a verdict and judgment in defendant's favor, and plaintiff has again appealed. Defendant has not seen fit to file an appearance nor brief in this court.

Because of the former opinion it is unnecessary to make a statement of the theories of the parties. Plaintiff strenuously contends that under the facts and the law the verdict of the jury is entirely indefensible. After a reading of the transcript of the evidence we are satisfied that this contention is a meritorious one, and it seems reasonably plain that the jury found for defendant because they believed that Jesse Binga, the president of Binga State Bank at the time the note was executed, got the \$6,500 from the bank but did not turn it over to defendant. Binga and defendant were relatives by marriage and had been intimate friends for fifty years. Defendant admits that he had transactions on a number

of occasions with Binga and that he had been a depositor of the bank from the time it opened twenty years before the signing of the note. He testified that for two or three years before the time of the signing of the note he had been after Binga to get him a farm and that finally Binga told him, "I will fix you up. I got a farm;" that he signed the note in question without reading it and upon representation by Binga that it was an application to purchase a farm, and that he received no consideration for the note. The great weight of the evidence shows that defendant signed the note and knew what he was doing when he signed it, and that on the same day that the note was signed the cashier of the Binga State Bank drew a loan check for \$6,500, payable to defendant, which was cashed by the Binga State Bank and bears the indorsement of defendant. The records show that the bank paid this \$6,500 upon the note in question and the note was carried by the bank as an asset and was found by plaintiff when he was appointed receiver of the bank by the Auditor of Public Accounts of the State of Illinois. In the opinion rendered upon the former appeal of this cause it was said (p. 83):

"If the president of the bank, in obtaining the execution of the note, knew that the note was being executed not for the benefit of the bank, but on the contrary, to obtain \$6,500 of the bank's money, notice to the president would not be notice to the bank because their interests would be conflicting, and the bank or its receiver could bring suit on the note and recover unless the defendant without negligence on his part, executed what he thought was an application for a farm and not a promissory note."

"Notice to an officer of a corporation is not notice to the corporation in transactions where the officer is dealing with the corporation in his own interest and not in the interest of the corporation." (Citing cases.) (American Guaranty Co. v. State Bank of East Lynn, 244 Ill. App. 16.)

Defendant admitted that the signing of the instrument in question involved a personal transaction between him and Binga. Both the receiver and the assistant receiver testified that defendant told them that he signed the note in order that Binga would be able to

of connection with Hings and that he had been a depositor of the bank from the time it opened twenty years before the signing of the note. He testified in 1902 and in 1903 years before the first of the signing of the note he had been with Hings in New York and that finally Hings told him "I will let you see I got a loan" that he signed the note in question without reading it and upon representation by Hings that it was an authorized purchase a loan, and that he received no consideration for the note. The grant weight of the evidence shows that defendant signed the note and that he was signing when he signed it, and that on the note that the note was signed and executed at New York, New York, and a loan made by Hings, Hings is defendant, which was made by the Hings, Hings and Hings the defendant at defendant. The evidence that the note was signed by the bank and the note is in question and the note was signed by the bank and was found by defendant when he was appointed receiver of the bank by the Auditor of Public Accounts of the State of Illinois. In the opinion rendered upon the former appeal of this cause it was said (p. 60):

"If the plaintiff of the bank, in obtaining the execution of the note, knew that the note was being executed not for the benefit of the bank, but on the contrary, to obtain a loan for the bank's money, notice to the plaintiff would not be notice to the bank because the plaintiff would be notified, and the bank would receive notice by the note and receive notice by the plaintiff's notice on his part, executed that he was signing for a loan and not a promissory note."

"It is an error of a corporation is not notice to the corporation in connection with the officer is dealing with the corporation in his own interest and not in the interest of the corporation." (Hings v. Hings, 100 Ill. 2d 111, 112, 113, 114, 115, 116, 117, 118, 119, 120, 121, 122, 123, 124, 125, 126, 127, 128, 129, 130, 131, 132, 133, 134, 135, 136, 137, 138, 139, 140, 141, 142, 143, 144, 145, 146, 147, 148, 149, 150, 151, 152, 153, 154, 155, 156, 157, 158, 159, 160, 161, 162, 163, 164, 165, 166, 167, 168, 169, 170, 171, 172, 173, 174, 175, 176, 177, 178, 179, 180, 181, 182, 183, 184, 185, 186, 187, 188, 189, 190, 191, 192, 193, 194, 195, 196, 197, 198, 199, 200, 201, 202, 203, 204, 205, 206, 207, 208, 209, 210, 211, 212, 213, 214, 215, 216, 217, 218, 219, 220, 221, 222, 223, 224, 225, 226, 227, 228, 229, 230, 231, 232, 233, 234, 235, 236, 237, 238, 239, 240, 241, 242, 243, 244, 245, 246, 247, 248, 249, 250, 251, 252, 253, 254, 255, 256, 257, 258, 259, 260, 261, 262, 263, 264, 265, 266, 267, 268, 269, 270, 271, 272, 273, 274, 275, 276, 277, 278, 279, 280, 281, 282, 283, 284, 285, 286, 287, 288, 289, 290, 291, 292, 293, 294, 295, 296, 297, 298, 299, 300, 301, 302, 303, 304, 305, 306, 307, 308, 309, 310, 311, 312, 313, 314, 315, 316, 317, 318, 319, 320, 321, 322, 323, 324, 325, 326, 327, 328, 329, 330, 331, 332, 333, 334, 335, 336, 337, 338, 339, 340, 341, 342, 343, 344, 345, 346, 347, 348, 349, 350, 351, 352, 353, 354, 355, 356, 357, 358, 359, 360, 361, 362, 363, 364, 365, 366, 367, 368, 369, 370, 371, 372, 373, 374, 375, 376, 377, 378, 379, 380, 381, 382, 383, 384, 385, 386, 387, 388, 389, 390, 391, 392, 393, 394, 395, 396, 397, 398, 399, 400, 401, 402, 403, 404, 405, 406, 407, 408, 409, 410, 411, 412, 413, 414, 415, 416, 417, 418, 419, 420, 421, 422, 423, 424, 425, 426, 427, 428, 429, 430, 431, 432, 433, 434, 435, 436, 437, 438, 439, 440, 441, 442, 443, 444, 445, 446, 447, 448, 449, 450, 451, 452, 453, 454, 455, 456, 457, 458, 459, 460, 461, 462, 463, 464, 465, 466, 467, 468, 469, 470, 471, 472, 473, 474, 475, 476, 477, 478, 479, 480, 481, 482, 483, 484, 485, 486, 487, 488, 489, 490, 491, 492, 493, 494, 495, 496, 497, 498, 499, 500, 501, 502, 503, 504, 505, 506, 507, 508, 509, 510, 511, 512, 513, 514, 515, 516, 517, 518, 519, 520, 521, 522, 523, 524, 525, 526, 527, 528, 529, 530, 531, 532, 533, 534, 535, 536, 537, 538, 539, 540, 541, 542, 543, 544, 545, 546, 547, 548, 549, 550, 551, 552, 553, 554, 555, 556, 557, 558, 559, 560, 561, 562, 563, 564, 565, 566, 567, 568, 569, 570, 571, 572, 573, 574, 575, 576, 577, 578, 579, 580, 581, 582, 583, 584, 585, 586, 587, 588, 589, 590, 591, 592, 593, 594, 595, 596, 597, 598, 599, 600, 601, 602, 603, 604, 605, 606, 607, 608, 609, 610, 611, 612, 613, 614, 615, 616, 617, 618, 619, 620, 621, 622, 623, 624, 625, 626, 627, 628, 629, 630, 631, 632, 633, 634, 635, 636, 637, 638, 639, 640, 641, 642, 643, 644, 645, 646, 647, 648, 649, 650, 651, 652, 653, 654, 655, 656, 657, 658, 659, 660, 661, 662, 663, 664, 665, 666, 667, 668, 669, 670, 671, 672, 673, 674, 675, 676, 677, 678, 679, 680, 681, 682, 683, 684, 685, 686, 687, 688, 689, 690, 691, 692, 693, 694, 695, 696, 697, 698, 699, 700, 701, 702, 703, 704, 705, 706, 707, 708, 709, 710, 711, 712, 713, 714, 715, 716, 717, 718, 719, 720, 721, 722, 723, 724, 725, 726, 727, 728, 729, 730, 731, 732, 733, 734, 735, 736, 737, 738, 739, 740, 741, 742, 743, 744, 745, 746, 747, 748, 749, 750, 751, 752, 753, 754, 755, 756, 757, 758, 759, 760, 761, 762, 763, 764, 765, 766, 767, 768, 769, 770, 771, 772, 773, 774, 775, 776, 777, 778, 779, 780, 781, 782, 783, 784, 785, 786, 787, 788, 789, 790, 791, 792, 793, 794, 795, 796, 797, 798, 799, 800, 801, 802, 803, 804, 805, 806, 807, 808, 809, 810, 811, 812, 813, 814, 815, 816, 817, 818, 819, 820, 821, 822, 823, 824, 825, 826, 827, 828, 829, 830, 831, 832, 833, 834, 835, 836, 837, 838, 839, 840, 841, 842, 843, 844, 845, 846, 847, 848, 849, 850, 851, 852, 853, 854, 855, 856, 857, 858, 859, 860, 861, 862, 863, 864, 865, 866, 867, 868, 869, 870, 871, 872, 873, 874, 875, 876, 877, 878, 879, 880, 881, 882, 883, 884, 885, 886, 887, 888, 889, 890, 891, 892, 893, 894, 895, 896, 897, 898, 899, 900, 901, 902, 903, 904, 905, 906, 907, 908, 909, 910, 911, 912, 913, 914, 915, 916, 917, 918, 919, 920, 921, 922, 923, 924, 925, 926, 927, 928, 929, 930, 931, 932, 933, 934, 935, 936, 937, 938, 939, 940, 941, 942, 943, 944, 945, 946, 947, 948, 949, 950, 951, 952, 953, 954, 955, 956, 957, 958, 959, 960, 961, 962, 963, 964, 965, 966, 967, 968, 969, 970, 971, 972, 973, 974, 975, 976, 977, 978, 979, 980, 981, 982, 983, 984, 985, 986, 987, 988, 989, 990, 991, 992, 993, 994, 995, 996, 997, 998, 999, 1000)

secure the money from the bank to purchase a farm for defendant. Defendant denied that he made this statement and insisted that he thought he was signing an application for the purchase of a farm, but a number of circumstances support the testimony for plaintiff in that regard. Defendant also denied that he signed the indorsement on the back of the loan check, but the evidence is practically conclusive that he did. Defendant admitted that he told the receiver, when the latter called him in about the note, that he was too old to pay a debt like that even if he owed it. After reading the entire record in this case we are satisfied that justice demands a retrial of the cause.

Upon a new trial the court should not give to the jury defendant's instruction number four, given to the jury in the instant trial, as it is highly misleading, to say the least. In the matter of instructions, in a future trial it should be borne in mind that even if defendant believed that he was executing an application for the purchase of a farm, nevertheless, he would not be entitled to a verdict in his favor if it also appeared, from the evidence, that he had been guilty of negligence in signing the note. (Morris v. Thurman, supra; see also Foodlawn Security Finance Corp. v. Doyle, 252 Ill. App. 63, 75; Sezely v. Searl, 230 Ill. App. 393, 398.) Moreover, if a jury found from the evidence that defendant in signing the instrument in question was assisting Binga to obtain \$6,500 of the bank's money, plaintiff could still recover against defendant even though the latter received none of the money thus secured from the bank. (Morris v. Thurman, supra.) The trial court should also bear in mind, in passing upon instructions, that defendant admits that the signing of the instrument in question involved a personal transaction between him and Binga.

The judgment of the Municipal court of Chicago is reversed and the cause is remanded for a new trial.
Gridley and Sullivan, JJ., concur. REVEREND AND REMANDED.

secure the money from the bank to purchase a farm for defendant.
Defendant denied that he made this statement and insisted that he
thought he was signing an application for the purchase of a farm,
but a number of circumstances support the testimony for plaintiff
in that regard. Defendant also testified that he signed the

instrument on the back of the loan check, but the evidence is
preponderantly contrary to that. Defendant testified that he
told the receiver, when the latter called him in about the note,
that he was too old to pay a note like that even if he were 16.
That being the entire reason he gave for his refusal to
execute the note.

Upon a new trial the court should not give to the jury
defendant's testimony without giving to the jury in the instant
case, as it is highly misleading, to say the least. In the matter
of instructions, in a later trial it should be borne in mind that
even if defendant believed that he was executing an application for
the purchase of a farm, nevertheless, he would not be entitled to
a verdict in his favor if it also appeared from the evidence, that
he was not fully of age at the time he signed the note. (Harris v.

Thompson, 100 Ill. App. 2d 100, 101, 102, 103, 104, 105, 106, 107, 108, 109, 110, 111, 112, 113, 114, 115, 116, 117, 118, 119, 120, 121, 122, 123, 124, 125, 126, 127, 128, 129, 130, 131, 132, 133, 134, 135, 136, 137, 138, 139, 140, 141, 142, 143, 144, 145, 146, 147, 148, 149, 150, 151, 152, 153, 154, 155, 156, 157, 158, 159, 160, 161, 162, 163, 164, 165, 166, 167, 168, 169, 170, 171, 172, 173, 174, 175, 176, 177, 178, 179, 180, 181, 182, 183, 184, 185, 186, 187, 188, 189, 190, 191, 192, 193, 194, 195, 196, 197, 198, 199, 200, 201, 202, 203, 204, 205, 206, 207, 208, 209, 210, 211, 212, 213, 214, 215, 216, 217, 218, 219, 220, 221, 222, 223, 224, 225, 226, 227, 228, 229, 230, 231, 232, 233, 234, 235, 236, 237, 238, 239, 240, 241, 242, 243, 244, 245, 246, 247, 248, 249, 250, 251, 252, 253, 254, 255, 256, 257, 258, 259, 260, 261, 262, 263, 264, 265, 266, 267, 268, 269, 270, 271, 272, 273, 274, 275, 276, 277, 278, 279, 280, 281, 282, 283, 284, 285, 286, 287, 288, 289, 290, 291, 292, 293, 294, 295, 296, 297, 298, 299, 300, 301, 302, 303, 304, 305, 306, 307, 308, 309, 310, 311, 312, 313, 314, 315, 316, 317, 318, 319, 320, 321, 322, 323, 324, 325, 326, 327, 328, 329, 330, 331, 332, 333, 334, 335, 336, 337, 338, 339, 340, 341, 342, 343, 344, 345, 346, 347, 348, 349, 350, 351, 352, 353, 354, 355, 356, 357, 358, 359, 360, 361, 362, 363, 364, 365, 366, 367, 368, 369, 370, 371, 372, 373, 374, 375, 376, 377, 378, 379, 380, 381, 382, 383, 384, 385, 386, 387, 388, 389, 390, 391, 392, 393, 394, 395, 396, 397, 398, 399, 400, 401, 402, 403, 404, 405, 406, 407, 408, 409, 410, 411, 412, 413, 414, 415, 416, 417, 418, 419, 420, 421, 422, 423, 424, 425, 426, 427, 428, 429, 430, 431, 432, 433, 434, 435, 436, 437, 438, 439, 440, 441, 442, 443, 444, 445, 446, 447, 448, 449, 450, 451, 452, 453, 454, 455, 456, 457, 458, 459, 460, 461, 462, 463, 464, 465, 466, 467, 468, 469, 470, 471, 472, 473, 474, 475, 476, 477, 478, 479, 480, 481, 482, 483, 484, 485, 486, 487, 488, 489, 490, 491, 492, 493, 494, 495, 496, 497, 498, 499, 500, 501, 502, 503, 504, 505, 506, 507, 508, 509, 510, 511, 512, 513, 514, 515, 516, 517, 518, 519, 520, 521, 522, 523, 524, 525, 526, 527, 528, 529, 530, 531, 532, 533, 534, 535, 536, 537, 538, 539, 540, 541, 542, 543, 544, 545, 546, 547, 548, 549, 550, 551, 552, 553, 554, 555, 556, 557, 558, 559, 560, 561, 562, 563, 564, 565, 566, 567, 568, 569, 570, 571, 572, 573, 574, 575, 576, 577, 578, 579, 580, 581, 582, 583, 584, 585, 586, 587, 588, 589, 590, 591, 592, 593, 594, 595, 596, 597, 598, 599, 600, 601, 602, 603, 604, 605, 606, 607, 608, 609, 610, 611, 612, 613, 614, 615, 616, 617, 618, 619, 620, 621, 622, 623, 624, 625, 626, 627, 628, 629, 630, 631, 632, 633, 634, 635, 636, 637, 638, 639, 640, 641, 642, 643, 644, 645, 646, 647, 648, 649, 650, 651, 652, 653, 654, 655, 656, 657, 658, 659, 660, 661, 662, 663, 664, 665, 666, 667, 668, 669, 670, 671, 672, 673, 674, 675, 676, 677, 678, 679, 680, 681, 682, 683, 684, 685, 686, 687, 688, 689, 690, 691, 692, 693, 694, 695, 696, 697, 698, 699, 700, 701, 702, 703, 704, 705, 706, 707, 708, 709, 710, 711, 712, 713, 714, 715, 716, 717, 718, 719, 720, 721, 722, 723, 724, 725, 726, 727, 728, 729, 730, 731, 732, 733, 734, 735, 736, 737, 738, 739, 740, 741, 742, 743, 744, 745, 746, 747, 748, 749, 750, 751, 752, 753, 754, 755, 756, 757, 758, 759, 760, 761, 762, 763, 764, 765, 766, 767, 768, 769, 770, 771, 772, 773, 774, 775, 776, 777, 778, 779, 780, 781, 782, 783, 784, 785, 786, 787, 788, 789, 790, 791, 792, 793, 794, 795, 796, 797, 798, 799, 800, 801, 802, 803, 804, 805, 806, 807, 808, 809, 810, 811, 812, 813, 814, 815, 816, 817, 818, 819, 820, 821, 822, 823, 824, 825, 826, 827, 828, 829, 830, 831, 832, 833, 834, 835, 836, 837, 838, 839, 840, 841, 842, 843, 844, 845, 846, 847, 848, 849, 850, 851, 852, 853, 854, 855, 856, 857, 858, 859, 860, 861, 862, 863, 864, 865, 866, 867, 868, 869, 870, 871, 872, 873, 874, 875, 876, 877, 878, 879, 880, 881, 882, 883, 884, 885, 886, 887, 888, 889, 890, 891, 892, 893, 894, 895, 896, 897, 898, 899, 900, 901, 902, 903, 904, 905, 906, 907, 908, 909, 910, 911, 912, 913, 914, 915, 916, 917, 918, 919, 920, 921, 922, 923, 924, 925, 926, 927, 928, 929, 930, 931, 932, 933, 934, 935, 936, 937, 938, 939, 940, 941, 942, 943, 944, 945, 946, 947, 948, 949, 950, 951, 952, 953, 954, 955, 956, 957, 958, 959, 960, 961, 962, 963, 964, 965, 966, 967, 968, 969, 970, 971, 972, 973, 974, 975, 976, 977, 978, 979, 980, 981, 982, 983, 984, 985, 986, 987, 988, 989, 990, 991, 992, 993, 994, 995, 996, 997, 998, 999, 1000)

The judgment of the Municipal Court of Chicago is reversed
and the cause is remanded for a new trial.
Circuit and Criminal Div., Chicago.
RECORDED AND EXHIBITED.

36304

49 A

ANNA CURTIS,
Appellee,

v.

PHILLIP STATE BANK AND
TRUST COMPANY, a corporation,
as Trustee,
Appellant.

APPEAL FROM CIRCUIT
COURT, COOK COUNTY.

270 I.A. 622

MR. PRESIDING JUSTICE SCANLAN DELIVERED THE OPINION OF THE COURT.

Complainant filed her bill to recover what she paid on a contract for the purchase of a lot. The cause was referred to a master, who recommended that a decree be entered finding that the contract was ultra vires as to the bank, and void, that complainant recover what she had paid defendant thereunder, with interest, and that the contract be canceled and returned to defendant, "and by removing as a cloud upon title any claims recorded or otherwise, which she asserted or asserts to said described property, of which others claiming under her assert or have asserted." The master's report was approved and confirmed in all respects "with the exception of the finding * * * concerning the \$600 paid by complainant to Wick M. Ellis for defendant." As to that item, the master found that complainant was not entitled to its return, but the decree provided that she should recover it.

The following are the material findings and conclusions of the master's report, as redrafted:

" * * *

"2. That defendant, Philip State Bank and Trust Company, was at all times an Illinois corporation, * * *, authorized to perform the acts set forth in the statute, including the power, as a bank, to loan money on real estate and to accept and execute trusts, and also had the powers conferred upon banks and trust companies.

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THE UNIVERSITY OF CHICAGO PRESS

1. The following are the main results of the paper:

THE UNIVERSITY OF CHICAGO

1. The first step is to identify the problem or question that needs to be answered. This involves understanding the context and the specific information required.

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• *Journal of Management*

"3. That complainant * * * is the widow of Patrick Francis Curtis * * *.

"4. That on February 23, 1928, 'The Nick M. Ellis Company (Not Inc.), by Nick M. Ellis, acknowledged receipt of \$600 from Patrick Curtis on a document (which is in evidence herein as Complainant's Exhibit 1 of December 30, 1930), which entitled Patrick Curtis to bid at an auction sale of lots described as 'In the Robey-Edgewater Golf Club Addition to Rogers Park in Cook County, Illinois,' and naming the conditions: one of which was that the successful bidder must pay one-third of the entire amount of his successful bid (on which the \$600 should apply) and the bidder must execute in writing and deliver to the vendor a contract satisfactory to the vendor, which contract must be complied with, to entitle the purchaser to a warranty deed; and also required the purchaser to pay the balance in equal monthly installments, with interest at 6 per cent per annum, payable monthly on all deferred payments 'At the office of Philip State Bank and Trust Company, 7001 North Clark Street, Chicago, Illinois,' extending over a period of not to exceed forty-eight months from date of sale. The document does not state who 'the vendor' is.

"5. That said Patrick Curtis had entered into the transaction described as a result of one or more visits made to him at his residence some weeks before by one James J. Theobald, a real estate broker, who described to him the location of the land which was to be auctioned as being in the vicinity of Albion and Seeley streets and stated an auction would be held to bid for the various lots at a date to be announced. Patrick Curtis and Anna Curtis visited the locality either in the company of Theobald (or a man named Carl Barkman, who had brought Theobald into contact with Patrick Curtis) and once again before the auction date.

"6. That Patrick Curtis died April 3, 1928. That the auction sale was set for April 12, 1928, at Hollison's Hall at Devon and Clark streets, and Anna Curtis received notice thereof signed 'Nick M. Ellis, by Theobald.' That two days before the auction Theobald told Anna Curtis she was eligible to bid and changed the name Patrick to Anna on the receipt document herein-before described as Complainant's Exhibit 1 * * *. That Anna Curtis attended the auction and after some three or four lots had been bid and sold, Lot 63, shown on a map or paper on the blackboard as being the northwest corner of Albion and Seeley streets with about 100 feet frontage on Albion and 74 feet on Seeley was offered and after bids of \$240 and \$245 per foot were made Anna Curtis bid \$250 and she was declared to be the successful bidder.

"7. That the correct legal description of said lot is - (Here follows the legal description.)

"8. That within a few weeks after the auction, Anna Curtis called at Phillip State Bank and Trust Company in response to a letter from the bank and saw Mr. Conrardi of the bank, who told her the contract was ready, or would be ready, and she said she would be back in a week with the money when her affairs were settled so she could get the money. That she came back later and paid Conrardi \$5,400 cash, and he gave her a receipt, which said receipt is in evidence herein as Complainant's Exhibit 3 of December 30, 1930, which receipt is dated May 19, 1928, signed 'Philip State Bank and Trust Company,' and recites that said sum of \$5,400 is the balance of the one-third down payment on lot in Robey-Edgewater Golf Club Addition and that 'said sum is to be held in escrow by the undersigned until the plat for said addition has been recorded and a contract executed by said Anna Curtis for

"6. That complainant * * * is the widow of Patrick

Thomas Davis * * *

"7. That on February 20, 1938, The High M. Mills

Company (Inc.), of New York City, advised complainant of

its plan to acquire the assets of the High M. Mills

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the purchase of said property in accordance with the terms of sale already made.' That the document bears the note 'Escrow 668.' That a week later, Saturday, May 26, 1928, she again saw Conrardi at the bank and signed the agreement dated April 12, 1928, being an agreement to purchase the premises described in paragraph 7 of this report, which said agreement is in evidence herein as Complainant's Exhibit 2 * * *; that said agreement was actually executed on May 26, 1928, and is between Phillip State Bank and Trust Company of Chicago, as Trustee, first party and Anna Curtis, second party.

"9. That Anna Curtis on May 19, 1928, by the payment of \$5,400 and the prior payment of \$600 had paid \$6,000 or one-third down on the contract price of \$18,000; that on October 20, 1928, she paid \$360 interest and \$1,500 principal; that on April 17, 1929, she paid \$315 interest and \$1,500 principal, leaving a balance of \$9,000 as of that date and has since paid nothing. That payments of interest were computed from April 12, 1928. That on March 18, 1930, she filed the contract with the Recorder of Deeds * * *.

"10. That said agreement, Exhibit 2, in the legal description recites that it is 'according to the Plat thereof recorded as Document Number 1024524,' but said number is a clerical error for Number 10024524, which is the correct number of record for this plat, while the erroneous number recited Number 1024524 is a chattel mortgage dated 1888 between strangers to this suit. This error was immaterial and was not a misrepresentation by which complainant was or could have been misled.

"11. That said agreement * * * provided that prior to March 1, 1929, the first party shall be the sole judge of local improvements which shall or shall not be made in streets or alleys in the subdivision; that paragraph twelfth provides that the first party agrees 'that prior to March 1, 1929, it will either install by private contract, without expense to the second party' certain described initial improvements such as sewer, gas main, cement sidewalk and street paving 'or pay all assessments therefor as and when such improvements are completed'; that these gave the first party the right as against the second party to be the judge of local improvements, and as to initial improvements the option was given the first party either to install them by private contract or pay assessments therefor when such improvements are completed; that the first party did not prior to March 1, 1929, install the cement walks or street paving; that there is no evidence that there have been any assessments therefor or that the first party has been called upon to pay such assessments. That it appears that the cement sidewalks or street paving has never been completed. That it is alleged by the first party in its answer that it is willing to pay any assessments when made.

"12. I find that there has been no breach of paragraphs eleventh and twelfth of the agreement by the first party thereto, the defendant here, as the same are a mere option.

"13. That Anna Curtis has been at all times aware that the cement sidewalk and street paving was not begun or completed by the first party prior to March 1, 1929, or prior to April 17, 1929, when she made a payment of principal and interest on said agreement, of \$1,500, and of \$315, respectively; that if there was any default of first party she waived same and ratified same and is estopped now to set same up as a default which would permit her to cancel the said Agreement.

"14. That on May 16, 1928, there was recorded in the office of the Recorder of Deeds as Document 10024523 and recorded in Book 260 of Plats at page 24, by John L. Lukanitsch, Ernest

Wilhelm Ehrlich, Frank Fortman and Katherine M. Fortman, his wife, and Peter Trausch, a subdivision and plat thereof entitled Nobey-Edgewater Golf Club addition to Rogers Park, etc., dated May 11, 1928, with certificate of the Land Surveyor dated May 4, 1928, and approved by the Examiner of Subdivisions of Chicago on May 15, 1928, which includes the premises hereinbefore described as in the agreement between said parties. Said plat is in evidence herein as Complainant's Exhibit 1 of January 20, 1931; that said plat was recorded three days before May 19, 1928, when Anna Curtis paid \$8,400 at the Phillip State Bank and Trust Company and ten days before May 26, 1928, when she signed the agreement bearing date of April 12, 1928; that it appears from said plat that John L. Lukanitsch was the owner of that piece of property in which the property herein described as contracted to be purchased by Anna Curtis was contained.

"15. That on November 2, 1928, there was recorded in the office of the Recorder of Deeds, as Document No. 10195860, a deed of trust dated October 29, 1928, between John L. Lukanitsch and Sadie Lukanitsch, his wife, James A. Theobald and Lillian D. Theobald, his wife, as grantors, and Phillip State Bank and Trust Company of Chicago, as trustee, under a trust agreement dated October 29, 1928, Trust No. 608, certain described real estate which includes the real estate herein described, and said document is in evidence herein as Complainant's Exhibit 2 of January 20, 1931. That said deed gives the trustee full power and authority to manage the property, sell or contract to sell, etc., and provides that the interest of the beneficiaries is declared to be personal property and to be in the earnings arising from disposition of the premises 'the intention hereof being to vest in the said Phillip State Bank and Trust Company of Chicago the entire legal and equitable title in fee in and to all of the premises above described.' That this instrument was executed about six months after the execution on May 26, 1928, of the agreement for sale between Phillip State Bank and Trust Co., of Chicago, as trustee, and said Anna Curtis. That no trust deed prior to the one of October 29, 1928, was put in evidence and no testimony as to any prior trust deed was given.

"16. That James A. Theobald has employed Nick M. Ellis & Co. (not inc.), to sell his property and that he was employed by said Ellis Co., as a salesman of the property when he approached Patrick Curtis in February, 1928 (according to Theobald's own testimony) and he testified that he owned the Lot 63 which Anna Curtis bid for on April 12, 1928, but whether he owned all of the property which was to be auctioned does not appear. That said Theobald made representations with reference to this real estate of a puffing character and indulged in opinions of present value and future value and profits, both to Patrick Curtis and later to Anna Curtis, but that he also took Patrick and Anna Curtis to view the premises and gave them a basis upon which to form their opinions, and that his puffing talk of present and future values did not constitute a fraudulent misrepresentation.

"17. That at the auction sale on April 12, 1928, Anna Curtis was at full liberty to use her judgment as to what lot to bid for and how much to bid, and knew what it would cost her and what the terms of payment would be, and even if Theobald suggested or urged to her that she bid for Lot 63, as Anna Curtis claims, there is no evidence that she followed his suggestion as a result of fraud, undue influence or otherwise so as to make her choice other than voluntary or so as to make his conduct fraudulent; that even if his conduct from the beginning to the end of the deal was fraudulent such conduct could not be charged to defendant, Phillip State Bank and Trust Co., of Chicago, as trustee, or otherwise since Theobald was not claimed to be the agent of defendant.

"18. That there is no evidence of any scheme between defendant and Lukanitsch, Theobald or others by which the defendant, as a bank, was to engage in the business of selling real estate, or to violate any laws of Illinois, and there is no evidence that defendant had any part or interest in the selling campaign of Nick M. Ellis, Not Inc., James Theobald or any others, or the auction sale; or in the subsequent agreement to sell (Complainant's Exhibit 2 of 12/30/30) at the time same was executed; that the only evidence was that the defendant was acting as an agent to receive payment of installments, interest, etc., as banks customarily do, and to receive moneys in escrow pending the filing of the plat; and that the defendant bank was later made trustee by deed of trust executed October 29, 1928 (Complainant's Exhibit 2 of 1/20/31); and that defendant by the agreement to sell to Anna Curtis, dated April 12, 1928, but actually executed May 26, 1928 (Complainant's Exhibit 2 of 12/30/30) asserted that it was acting in the capacity of trustee and not of owner and that the fact is that defendant was not appointed trustee by any document in evidence here except the trust deed of October 29, 1928, or over five months after it asserted itself to be a trustee in the agreement to sell to Anna Curtis, described immediately above; that defendant itself, or its agent Conrardi, made no misrepresentations to complainant or her deceased husband in his lifetime, and is not chargeable with any alleged misrepresentations of others not its agents; but that the representation by defendant that it was acting as 'trustee' in executing the agreement to sell to Anna Curtis was a false representation as it did not become a trustee until over six months afterwards, as above recited; that this false representation is a material one, if as a matter of law the defendant bank was not actually a trustee of said property at the time it agreed to sell same or did not have power to make said agreement to sell, then said agreement would be null and void because it was beyond the power of defendant to make.

"19. That if April 12, 1928, the date of the auction, be considered to be the date of the agreement to sell here attacked, then there is no evidence to show that the defendant was the seller, at that time, or had any interest in said auction. That if the attacked agreement to sell be relied on to sustain complainant's bill, then it is clear that it was actually executed on May 26, 1928, after the plat had been filed. That the fact that interest payments were computed from April 12, 1928, cannot change the fact that the actual date of execution of the agreement sought to be cancelled was May 26, 1928. That on that date the plat had already been filed, as otherwise recording number could not have been printed in said agreement. That even if the plat had not been filed prior to the agreement to sell so as to subject defendant to the penalties of the statute, that would not make the agreement void or illegal, especially as it caused no mistake as to the identity of the lot to be purchased. That defendant recorded said agreement with the Recorder of Deeds as Document No. 10616356 on March 18, 1930, and thereby ratified said agreement and is estopped from contending that the agreement is void because no plat had been duly filed.

"20. That under the facts as found hereinabove the relief prayed for should be granted or refused upon a proper decision of the following contentions of complainant and defendant:

"(a) Complainant contends that as there was no evidence that defendant was a trustee other than the trust deed executed October 29, 1928, which was more than six months after April 12, 1928, the date of the auction sale, and more than five months after May 26, 1928, the date of execution of the agreement to sell, dated April 12, 1928, in such event the defendant bank had no power to make the agreement to sell unless and until the defendant's capacity and authority as a trust company had been established

and fixed by a deed of trust to it making it an actual trustee, and that as there was no such deed of trust executed until five or six months after the agreement to sell to complainant, Anna Curtis, the defendant bank was acting not as a trust company, but merely as a bank and as a bank it would have no power or authority to execute the agreement to sell and that such agreement was void as exceeding the corporate powers of a bank, and not merely voidable; that being void it was a nullity which could not be cured by any subsequent execution of a deed of trust, or be possible of ratification subsequently by any act of Anna Curtis;

"(b) Defendant contends that although as a bank it would have no corporate power to make an agreement to convey real property which it did not presently lawfully own, but which it expected to acquire in time to fulfill such agreement, nevertheless defendant had such power as a trust company, and that it had power to convey at a future date, as trustee, property as to which it expected to be made a trustee before the future date for conveyance would arrive; and that in this case it actually was created a trustee before the date on which under the agreement it would be called upon to make the actual conveyance to complainant, Anna Curtis. A secondary contention of defendant is that as Anna Curtis made payments of principal and interest on April 17, 1929, which was six months after the deed of trust was executed, she ratified the transaction and cured the original lack of corporate power in the bank, and as she recorded with the Recorder of Deeds her contract of sale on March 15, 1930, she both ratified the original agreement to convey and also estopped herself from questioning the same. Such secondary contention of defendant is good if the agreement to sell was merely avoidable, but is not good if the agreement to sell was a void act beyond the corporate powers of the defendant, and therefore such secondary contention must depend upon the decision of the main contentions of the complainant and the defendant.

"21. My conclusion of law is that the contention of complainant is sustained by the case of Tietke v. Union Bank of Chicago, 259 Ill. App. 341, and the authorities therein cited; certiorari was denied by the Supreme Court, and therefore the attempted agreement to sell is void and not voidable.

"22. I find that the complainant has sustained the material allegations of her bill and amended bill sufficiently to establish that the agreement to sell made by defendant was and is null and void, and that defendant has no right to retain and complainant has a right to receive back all sums of money and all interest thereon by complainant paid to defendant, but not the \$600 paid by Patrick Curtis or Anna Curtis, his wife, for the privilege of bidding at the auction sale; that complainant has offered to do equity by returning to defendant and canceling said agreement to sell, and that decree should so provide and should also provide that complainant, Anna Curtis, should remove as a cloud on title her recordation of said agreement to sell with the Recorder of Deeds, and any other clouds created by her.

"23. I have no alternative than to recommend as I do, that a decree be entered accordingly finding that the equities of the bill and supplemental bill of complaint are with complainant; that said agreement to sell was and is null and void; that defendant should return and be decreed to pay to complainant all sums of principal and interest by her paid to defendant, except \$600 paid to Nick M. Ellis, not inc., for the privilege of bidding at an auction sale; that complainant shall do equity by cancelling and returning to defendant said agreement to sell and by removing as a cloud upon title any claims recorded or otherwise, which she asserted or asserts to said described property,

of which others claiming under her assert or have asserted; that the costs be decreed against defendant, including the master's and stenographer's fees, upon this reference, to be by the court taxed as a part of the costs of this suit. * * *

As originally drafted, complainant filed certain objections to the report, which were all allowed. In its brief defendant states that "the findings of fact in the master's report are in accordance with the evidence."

Defendant contends: "If one seeks to recover from a corporation the amount paid under a contract entered into with such corporation as trustee, and sues the corporation as trustee, there can be no recovery against the corporation except as trustee and the party suing can not assert that the corporation did not have corporate power to act as trustee in making such contract;" that "when a purchaser at an auction sale seeks to recover in equity the money paid to a bank under a contract entered into by such purchaser with this bank as trustee of the vendor, and pursuant to the terms of such auction sale, and this bank was not, and in entering into such contract did not purport to have been, the vendor at such auction sale, equity can not allow any recovery without the presence of such vendor as a party to the suit though such recovery is sought on the ground that the bank had no corporate power to enter into such contract as such trustee; and the objection that the vendor is not made a party defendant may be raised for the first time in this court, even though the sustaining of such objection requires the dismissal of the suit." The point involved in these contentions seems to be an afterthought and was first raised by additional assignments of errors. Defendant argues that complainant sued the bank as trustee and thereby made the following admissions: "1. That the bank had corporate power to make this contract as trustee, for if the bank had no such power, then obviously it was not trustee; and 2. that the bank is answerable to complainant only as trustee, the bank being

sued only as such." Defendant cites no authority in support of its contention and asserts that no case can be found in the books that bears upon it. It is true that several times in the amended bill complainant refers to defendant as trustee, but it is also true that in a number of paragraphs in the amended bill she charges defendant not as trustee but as a banking corporation. In paragraph four complainant charges "that all of the acts of the defendant in this regard were done with the full knowledge and assent of its officers and directors, and were done by the said defendant, not in any capacity as trustee or otherwise but as an Illinois banking corporation." In the prayer for relief in the amended and supplemental bill of complaint complainant prays "that the defendant Phillip State Bank and Trust Co. may be decreed to pay to the complainant the sum of \$9,675, which said sum was paid by the complainant to the defendant pursuant to the said contract * * *." The decree finds that "the court further finds from the evidence that the defendant, Phillip State Bank and Trust Co., was at all times herein a banking corporation organized under the laws of the State of Illinois, and was at all times subject to the restrictions placed by statute on banking corporations, one of which was that the defendant, as a bank, was expressly prohibited from dealing in or with real estate for its own profit." It is plain that the bill stated a cause of action against defendant in its capacity as a banking corporation, and the words "as trustee" are but descriptive personae. (See Martin v. Parker, 317 Ill. 348, 354.) If the contract was ultra vires and void ab initio complainant might have sued defendant in a suit at law (Pietke v. Union Bank of Chicago, 339 Ill. App. 341), and if in her pleadings she added the words "as trustee" to the corporate name of defendant, the liability of defendant in its corporate capacity would have been in no way changed. (See Wahl v. Schmidt, 307 Ill. 331, 341.)

Defendant contends: "Where real estate is purchased at an auction sale, the terms of which are agreed upon, and the purchaser pays money on such purchase to a bank as agent of the vendor, and afterwards the purchaser enters into a contract with the bank as trustee for the vendor for the purchase of the same property and under these same terms, and makes payments to the bank as such trustee, the latter payments will be regarded in equity as having been paid under the contract made at the auction sale if the contract with the bank as trustee is ultra vires as to the bank and, in consequence, invalid;" and "when money is paid on an oral contract for the purchase of real estate, recovery will not be allowed for such money (a) where the party to whom such payment is made receives no benefit therefrom and has not refused performance under the contract, or (b) where the purchase was made at an auction sale and a memorandum of the terms of purchase was made and signed by the clerk of the auctioneer at the sale." We find it somewhat difficult to follow the argument of defendant in support of the instant contentions. It argues, apparently, that the receipt for \$600 which was issued by "The Nick M. Ellis Company (Not Inc.) By Nick M. Ellis (Seal)," "covered all the terms to make a definite contract with the exception of the description of the real estate which, of course, could not be determined until the auction sale and the complainant had bid for a particular lot and such bid had been accepted by the auctioneer;" that the receipt, either alone, or considered in connection with the fact that complainant bid it at auction "and this lot was knocked down to her," and that she then paid \$5,400 to defendant, constituted the contract, and that if the contract that was thereafter entered into with the bank as trustee was void, the prior contract would still be valid, and that the moneys paid to the bank as trustee must be regarded as belonging to the vendor, and that if the vendor should sue to

...the bank as trustee for the vendor for the purchase of the same
property and under these same terms, and when payments to the
bank as such trustee, the latter payments will be regarded as
equity as having been paid under the contract made at the auction
sale if the contract with the bank as trustee is valid as to
the bank and, in consequence, "valid" and "such money is paid
as an actual payment for the purchase of real estate, thereby will
not be allowed for such money (a) where the bank is shown such pay-
ment in whole or in part, or (b) where the bank was not at
the time under the contract, or (c) where the bank was not at
an auction sale and a commission of the bank at auction was not
and signed by the clerk of the auction at the sale." as the
it is somewhat difficult to follow the argument of defendant in support
of the instant contention. It appears, apparently, that the receipt
for the bank was issued by "The Bank of New York (not inc.)"
by the bank, which "covered all the same as made a delivery
conveyed with the receipt by the bank to the bank and
valid, it appears, could not be obtained until the auction sale and
the assignment had been for a particular lot and such bid had
been accepted by the bank, and the receipt, which
alone, or considered in connection with the fact that complaint
did it of auction and this lot was knocked down to her," and that
the bank was not at the time, considered the contract, and
that if the contract had been assigned into the bank
as trustee was valid, the prior contract would still be valid, and
that the receipt was in the bank as trustee must be regarded as
conclusive in the matter, and that if the vendor should sue the

recover this money from the bank he would prevail in such proceeding and therefore complainant should not be allowed to prevail in the instant suit, and that complainant bought the lot "from someone else at this auction sale" and the payments made by complainant will be regarded as having been made under the original contract. The receipt given by the Nick M. Ellis Company was not intended as a contract. It was merely a receipt for moneys paid, and the unmentioned vendor was not bound thereby, as clearly appears from its phraseology:

"The Nick M. Ellis Co.

"Subdividers

"(not inc.)

"Chicago, Illinois Feb. 23, 1928.

"Receiver of Anna Curtis, Address 1627 Wallen
Patrick

Avenue Six Hundred and No/100 Dollars which will entitle to bid at the auction sale of lots in the Robay-Edgewater Golf Club Addition to Rogers Park in Cook County, Illinois, pursuant to the conduct and terms of said auction. The said right to bid hereby conferred shall terminate if and when he becomes a successful bidder and purchaser of one lot at said sale. Within ten days after the acceptance of said bid by the Vendor, said successful bidder shall pay to the Vendor in cash one-third of the entire amount of said successful bid, (said \$600.00 to be then applied on account of said one-third payment), and execute in writing and deliver to the Vendor a contract satisfactory in form and substance to Vendor, specifying the terms and conditions to be complied with to entitle the purchaser to a warranty deed. * * * Should the Purchaser fail to make the one-third payment herein provided for, within said ten days, then said sum of \$600.00 shall be forfeited to the Vendor as his liquidated damages. The right to bid shall at all times be considered personal property only, and said purchaser shall have no interest in any lot until said contract shall be executed and delivered. * * *

The receipt for the \$5,400 given by defendant to complainant, reads as follows:

"5/19/28 1928

"Received of Anna Curtis, Fifty Four Hundred \$ Dollars (\$5400.00) being balance of one third down payment on purchase price of Lot No..... in Robay-Edgewater Golf Club Addition; said sum to be held in escrow by the undersigned until the plat for said addition has been recorded and a contract executed by said Anna Curtis for the purchase of said property in accordance with the terms of sale already made.

"Phillip State Bank & Trust Company
"N. W. Conrardy"

If the two receipts be considered together it is plain that it was

recovered this money from the bank he would have it in such possession and therefore complaint should not be allowed to prevail in this instant suit, and that complaint brought the lot "from account also of this auction sale" and the payments made by complaint will be regarded as having been made under the original contract. The receipt given by the Nick N. Ellis Company was not included in a contract. It was merely a receipt for money paid, and the money paid was not bound thereby, as clearly appears from the

17292 *Camponotus*

SECRET
CONFIDENTIAL

WILLIAM VANCE WOODWARD, JR. to "WILLIAM VANCE WOODWARD, JR."

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[illegible]

The research for this book was by no means a simple task.

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with the Bureau of the State Department. The Bureau of the State Department is the only one of the three which is not a part of the Executive Branch. It is the only one of the three which is not a part of the Executive Branch. It is the only one of the three which is not a part of the Executive Branch.

1947

It is the intention of the Commission to publish the results of the study in a report to the President of the United States.

not the intention to bind the unknown vendor until a formal contract "satisfactory in form and substance to Vendor" was executed. It will be noticed that the receipt for the \$5,400 was signed by defendant in its capacity as a bank. Defendant executed and delivered to complainant the contract of April 12, 1928. Complainant, in her bill, alleges that she paid to defendant the sum of \$9,675 under and by virtue of the alleged contract, and defendant in its answer admits the truth of these allegations. On the back of the alleged contract defendant made the following indorsement: "Received on the within Contract the following sums: \$600 Principal," thereby acknowledging that it had received the \$600 paid by complainant to Nick M. Ellis Company. It, in the same manner, acknowledged the receipt of the \$5,400. The property in question was conveyed to defendant as trustee about six months after the execution of the alleged contract. No evidence was introduced by defendant concerning its actions as such trustee, nor regarding the disposition of the moneys it received. The present alarm of defendant as to the possible consequences to it if we sustain the instant decree does not, under the record in this case, appeal to us. (See Tietke v. Union Bank of Chicago, supra, 345.) The instant contentions of defendant are also afterthoughts. It makes no such defenses in its answer to the amended bill, but, on the contrary, defends the contract and offers to fulfill all of its obligations thereunder and insists that the contract should be enforced, and that "the sole reason for the action by the complainant in this case is the severe and general decline in the real estate market which has taken place during the past two years."

Defendant has argued a number of contentions that relate to the question as to whether or not the alleged contract was ultra vires and void. It first takes the somewhat surprising position that "complainant failed to sustain the burden of proof

that rested upon her to show that there had been no conveyance to the bank in trust of this property at the time this contract was executed," and defendant argues that even though the trust deed by which the bank acquired title to the property in question bears a date subsequent to the contract of purchase we should infer that the bank had title at the time of the execution of the alleged contract, or that, in any event, the burden was upon complainant to show that the bank had not title, and that she failed in that regard. The master found "that this instrument (referring to the trust deed) was executed about six months after the execution on May 26, 1928, of the agreement for sale by the Phillips State Bank & Trust Company of Chicago, as of October 29, 1928 was put in evidence and no testimony as to any prior trust deed was given;" also "that the fact is that defendant was not appointed trustee by any document in evidence here except the trust deed of October 29, 1928, or over five months after it asserted itself to be a trustee in the agreement to sell to Anna Curtis." No objection was made by defendant to any of the findings of fact made by the master, and, ^{as} we have ~~xx~~ heretofore stated, defendant concedes that all of the findings of fact in the master's report are in accordance with the evidence. Defendant, after the master's report, made no effort to have the hearing reopened in order that it might supplement its proof, although the master stated in his report that he was finding that complainant had sustained the material allegations of her bill and amended bill on the sole ground that the agreement to sell made by defendant was and is null and void because the trust deed to defendant was executed more than six months after the date of the auction sale and more than five months after the date of execution of the agreement to sell. Furthermore, the master stated that the two contentions made before him by defendant were (a) "that although as a bank it would have no corporate power to make an agreement to convey real property which

that stated that it is not true that the bank had been in default
to the bank in terms of this property and the time this contract
was executed, and defendant argues that even though the bank
does by which the bank acquired title to the property in question
there is a date subsequent to the contract of purchase as shown in the
fact the bank had title at the time of the execution of the alleged
contract, or that, in any event, the burden was upon complainant
to show that the bank had not title, and that was failed in that
respect. The master found "that this instrument (relating to the
trust deed) was executed about six months after the execution on
May 26, 1923, of the agreement for sale by the William Wade Bank
Trust Company of Chicago, as of record 27, 1923, and in evidence
and no testimony as to any prior deed was given;" also "that
the fact is that defendant was not apprised of the fact by any document
in evidence here except the trust deed of October 26, 1923, or over
five months after it was made in fact to be a trustee in the agreement
to sell to Mrs. Guita". To objection was made by defendant so any
of the findings of fact made by the master, and ^{as} ~~the~~ ^{the} master
also stated, defendant concedes that all of the findings of fact
of the master's report are in accordance with the evidence. Defen-
dant, after the master's report, made no effort to deny the master
reported in order that it might supplement the proof, although the
master stated in his report that he was finding that complainant
had executed the material allegations of her bill and amended bill
in the case except that the agreement to sell made by defendant was
not in full and valid because the trust deed in defendant was executed
more than six months after the date of the execution of the agreement to sell.
Furthermore, the master stated that the two contentions made before
him by defendant were (a) "that although on a deed it would have
no operative force in such an agreement to convey real property which

it did not presently lawfully own, but which it expected to acquire in time to fulfill such agreement, nevertheless defendant had such power as a trust company, and that it had power to convey at a future date, as trustee, property as to which it expected to be made a trustee before the future date for conveyance would arrive; and that in this case it actually was created a trustee before the date on which under the agreement it would be called upon to make the actual conveyance to complainant;" and (b) "that complainant, by making payments of principal and interest six months after the deed of trust was executed, ratified the transaction and cured the original lack of corporate power in the bank." It is evident that the instant contention of defendant is an afterthought and without merit.

The master held, under the authority of Fietke v. Union Bank of Chicago, supra, that defendant had no power or authority to make the agreement to sell and that such agreement was void, and not merely voidable, as exceeding the corporate powers of a bank, and that being void it was a nullity which could not be cured by the subsequent execution of the deed of trust nor by any alleged act of ratification of complainant. The chancellor sustained the master in that regard. In the Fietke case (certiorari denied by the Supreme court) we said (pp. 344-5):

"That the contract was void ab initio for want of power in defendant under its charter as a bank to deal in real estate other than that necessary to do its banking business and that to which it may obtain title in the collection of its debts, is not questioned (Cahill's St. ch. 16a, paragraph 9.) But appellee seeks to sustain its authority to execute the contracts in question on the ground that it is qualified to do business as a trust company. To be sure, under the trust statute (Cahill's St. ch. 32, paragraph 345) it may as a corporation execute trusts and be appointed trustee by deed. But there is nothing in the stipulated facts which confer upon defendant any such trust relation as contemplated by said Act. The only power conferred upon it in the trust agreement to which it was a party is that of collecting and distributing money. It held no trust relation to deal with the title to real estate. It was given no title to the lots involved or power as trustee, agent or otherwise, to sell them or contract for their sale, hence its con-

is not necessarily binding even, but when it is executed to negative in time to fulfill such agreement, nevertheless, defendant had been power as a trust company, and that it had power to convey at a future date as trustee, property as to which it is expected to be made a trustee before the United States Supreme Court is decided and that in this case it actually was executed a trustee before the date on which under the agreement it would be called upon to make the actual conveyance to complainant, and (2) "that complainant, by making payments of principal and interest six months after the date of time was executed, ratified the transaction and thus the original loss of corporate power in the bank, it is evident that the instant transaction of defendant is an absolute and without error."

The court held, under the authority of United v. Bank of Montreal, that defendant had no power to absolutely ratify the agreement to sell and that such agreement was void, and was merely voluntary, as exceeding the corporate power of a bank, and that being void it was a nullity which could not be cured by the subsequent execution of the deed of trust nor by any alleged ratification or acquiescence. The court also concluded the matter in its favor. In the first case (1891) Bank of Montreal v. United States it said (100 U.S. 440):

"That the contract was void as to the bank for want of power is determined under the charter as a bank to deal in real estate other than that necessary to its banking business and that to which it may relate in the collection of its notes, is not questioned (Gallie's case, 100 U.S. 440, 441). And again it is said in the opinion to sustain the contract in question on the ground that it is qualified to do business as a trust company. To be sure, under the trust statute (Gallie's case, 100 U.S. 440, 441) it may be a trust company, but there is nothing to show that it was so organized or that it was so acting as the plaintiff bank which contract was declared void. The only power now stated to be in the bank is to receive deposits and to make loans and to collect and to pay interest on loans. It said no power is given to deal with real estate or to sell or lease or otherwise to dispose of real estate or to mortgage or otherwise to encumber the same."

tract was ultra vires as outside the scope of any power it possessed and unenforceable by either party to the contract. (Mercantile Trust Co. v. Kaster, 273 Ill. 332, 342.) While in such a case neither party can sue on the contract, the money paid by a party thereon may be recovered back as money had and received to his use. That being so, it inevitably follows that plaintiff's right to the recovery of the money he has paid defendant cannot be defeated, as argued by appellee, on the ground that he was in default in payments required to be made under the void contract.

"Appellee argues that defendant bank acquired authority from Croissant to act as his agent because his employee brought the contracts to defendant 'for signature,' as was stipulated to, and that it signed them as 'agent.' But even if Croissant so intended, it is clear that the attempt of the bank to act as such did not constitute such a trust relation as contemplated by the trust act."

We think the Fietke case applies to the facts of the instant one and that the master and the chancellor were justified in following it. Defendant argues that complainant is estopped from claiming that the alleged contract is ultra vires because she recognized and operated under the contract by standing by and permitting certain improvements to be installed in and about the lot in question, and by making further payments thereunder. We have carefully considered the authorities cited by defendant in support of this argument but we do not believe that they are applicable to the instant case. The principle that applies to the instant contention is stated in Central Transportation Co. v. Pullman's Palace Car Co., 139 U. S. 34, wherein it was argued that even if the contract sued on was void because ultra vires and against public policy, yet that, having been fully performed on the part of the plaintiff, and the benefits of it received by the defendant for the period covered by the declaration, the defendant was estopped to set up the invalidity of the contract as a defense to the action to recover the compensation agreed on for that period. As to this contention the court said:

"The view which this court has taken of the question presented by this branch of the case, and the only view which appears to us consistent with legal principles, is as follows:

"A contract of a corporation, which is ultra vires, in the proper sense, that is to say, outside the object of its creation as defined in the law of its organization, and therefore beyond the powers conferred upon it by the legislature, is not

voidable only, but wholly void, and of no legal effect. The objection to the contract is, not merely that the corporation ought not to have made it, but that it could not make it. The contract cannot be ratified by either party, because it could not have been authorized by either. No performance on either side can give the unlawful contract any validity, or be the foundation of any right of action upon it.

"When a corporation is acting within the general scope of the powers conferred upon it by the legislature, the corporation, as well as persons contracting with it, may be estopped to deny that it has complied with the legal formalities which are prerequisites to its existence or to its action, because such requisites might in fact have been complied with. But when the contract is beyond the powers conferred upon it by existing laws, neither the corporation, nor the other party to the contract, can be estopped, by assenting to it, or by acting upon it, to show that it was prohibited by those laws."

This language is quoted with approval in National Home Bldg. Ass'n v. Home Savings Bank, 181 Ill. 35, 45. (See also Beut Brewing Co. v. Klaassen, 185 Ill. 37; Stacy v. Glen Allyn Hotel Co., 225 Ill. 546, 552.)

Defendant contends that "any failure on the part of the bank to obtain title as trustee to this lot before the bank executed the contract in question as trustee was at most only an irregularity which did not make the contract void and which was curable by a subsequent conveyance of title to the bank in trust." It is true, under the trust statute (Sahill's St. (1931) ch. 32, par. 345) defendant may, as a corporation, execute trusts and be appointed trustee by deed, but if the original contract was wholly void and not merely voidable the subsequent conveyance of title to the bank in trust did not make the agreement valid.

Defendant next contends that the chancellor erred in permitting complainant to recover the \$600 which was paid to Wick M. Ellis Company (Not Inc.) before the auction sale, as "there is no evidence to show that any portion of this money ever came to the hands of the bank." It is a sufficient answer to this contention to restate what we have already said, that the bank acknowledged, on the back of the contract it made with complainant, the receipt of the \$600.

Defendant next contends that the chancellor erred in allowing complainant "to recover the initial payment of \$5,400 which she paid to the bank as agent for the vendor and before the contract in question here was ever entered into." It is a sufficient answer to this contention to say that the bank also acknowledged the receipt of this \$5,400 on the back of the contract.

Defendant again argues that "so far as the proof goes, the bank may have long since paid over to the beneficiaries under this trust every cent that complainant paid it as trustee. It follows that complainant is not entitled to a recovery in any amount even if the contract were void." No such defense was raised nor suggested by the pleadings nor during the trial of the cause, nor was any such point made by way of objection to the master's findings and conclusions. By its answer defendant asserted that it was ready and willing to perform its part of the contract. Moreover, while complainant could not have sued upon the contract, she would have had the right to recover back the money she paid in an action at law, as money had and received to her use. (Tietke v. Union Bank of Chicago, *supra*, 344.)

Defendant finally contends that complainant should not have been allowed to recover interest under the statute (par. 2, ch. 74, Cahill's Rev. St. of Ill., 1931) because defendant has not been guilty of unreasonable and vexatious delay in retaining the money that complainant paid to it. The allowance of interest in this case was not predicated upon that statute.

"Neither the bill nor the cross-bill makes any claim for interest, and the case is not one of those in which the statute provides that interest shall be allowed. In equity, however, interest is allowed because of equitable considerations, and is given or withheld as under all the circumstances of the case seems equitable and just. (Heady v. White, 168 Ill. 76.) The Central Trust Company having received funds which belonged to the trust and savings bank, if it retained them without authority of

the undersigned in question have not even entered into." It is a
mistake to say that the bank was
not concerned in this transaction as it was not.

the would have had the right to recover back the money she paid in
However, while complaint was not made upon the contract
it was ready and willing to perform its part of the contract.
findings and conclusions. By the answer defendant asserted that
nor was any such point made by way of objection to the answer's
not suggested by the pleadings nor during the trial of the cause,
amount even if the contract were void." No such defense was raised
before that complaint is not entitled to a recovery in any
this finding every case that complaint held it as granted. It
was held by the court that the defendant's motion
for judgment again refused "as for as the first issue".

Value of stock at close

that explanation paid to it. The absence of interest in this case
guilty of unbecomable and vicious delay in retaining the money
Mr. Connel's Nov. 22, 1931, because defendant has not been
has been allowed to recover interest under the statute (Nov. 2, 1931
defendant finally confesses that confidential agents are

[illegible]

law, should account for interest from the time a demand was made for payment, which was when the cross-bill was filed. Whittemore v. People, 227 Ill. 453." (Golden v. Cervenka, 278 Ill. 409, 433. See also Duncan v. Dacey, 318 Ill. 500, 527.)

If we are correct in our holding that the contract was ultra vires and void then it would seem to be equitable and just that complainant should be allowed interest, as the bank has had the use of a considerable sum of money for a long period of time.

After a careful and patient consideration of the many contentions raised by defendant, we have reached the conclusion that the decree of the Circuit court of Cook county should be affirmed, and it is accordingly so ordered.

AFFIRMED.

Gridley and Sullivan, JJ., concur.

36155

HERBERT C. HELLER & CO., Inc.,
a Corporation,

Appellant,

vs.

DOWDLE BROTHERS CO.,
a Corporation,

Appellee.

APPEAL FROM CIRCUIT COURT
OF COOK COUNTY.

270 I.A. 622²

MR. JUSTICE GRINLEY DELIVERED THE OPINION OF THE COURT.

In an action in assumpsit, commenced July 12, 1930, for damages for the claimed breach by defendant of a contract, there was a trial in the circuit court without a jury in May, 1932, resulting in the court finding the issues in defendant's favor and entering a judgment for costs against plaintiff. By this appeal plaintiff seeks to reverse the judgment and to have this court enter a judgment here against defendant for \$91,770.

Plaintiff's declaration consisted of a special count and the common counts. In the special count plaintiff alleged that on April 23, 1930, it was engaged in the business of buying and selling bonds and other investment securities, and defendant was engaged in the general contracting business, including the construction of public improvements; that prior to said date plaintiff was advised that defendant had submitted a bid for, or was interested in, a contract for the construction of a system of sewers in the Village of Wilmette, Illinois, and that if the contract was awarded to it defendant would have approximately \$1,300,000 Village of Wilmette Six Per Cent Sewer Bonds to dispose of, and defendant requested plaintiff to submit a bid therefor; that accordingly on said date, plaintiff at New York submitted by telegram a bid to defendant at Chicago for the purchase of the bonds, as follows (*italics ours*):

"We bid you for approximately \$1,300,000 Village Wilmette six per cent. sewer bonds, maturing from one to twenty years,

WILLIAM C. MILLER & CO., INC.
ATTORNEYS AT LAW

UNITED STATES DISTRICT COURT

OF THE SOUTHERN DISTRICT

270 I.A. 622

THE JUSTICE GRANTING THE ORDER OF THE COURT.

IN AN ORDER IN REPLY TO, DATED MAY 27, 1933, THE
ORDER FOR THE CLAIMED BY DEFENDANT AT A CONTINUANCE, THERE
WAS A TRIAL IN THE DISTRICT COURT WITHIN A DAY IN MAY, 1933, THE
SITTING IN THE COURT FINDING THE ISSUES IN DEFENDANT'S FAVOR AND
ENTERING A JUDGMENT FOR COSTS AGAINST PLAINTIFF. BY THIS ORDER
PLAINTIFF SEEMS TO REVERSE THE JUDGMENT AND TO HAVE THIS COURT
ENTER A JUDGMENT AGAINST DEFENDANT FOR \$91,770.

PLAINTIFF'S DECLARATION CONSISTED OF A SPECIAL COUNT AND
THE COMMON COUNT. IN THE SPECIAL COUNT PLAINTIFF ALLEGED THAT
ON APRIL 23, 1933, IT WAS ENGAGED IN THE BUSINESS OF BUYING AND
SELLING BONDS AND OTHER INVESTMENT SECURITIES, AND DEFENDANT WAS
ENGAGED IN THE GENERAL CONTRACTING BUSINESS, INCLUDING THE CON-
STRUCTION OF PUBLIC IMPROVEMENTS; THAT PRIOR TO SAID DATE PLAINTIFF
WAS ADVISED THAT DEFENDANT HAD SUBMITTED A BID FOR, OR WAS
INTERESTED IN, A CONTRACT FOR THE CONSTRUCTION OF A SYSTEM OF SEWERS
IN THE VILLAGE OF WILMETTE, ILLINOIS, AND THAT IF THE CONTRACT WAS
AWARDED TO IT DEFENDANT WOULD HAVE APPROPRIATELY \$2,300,000 VILLAGE
OF WILMETTE SIX PER CENT SEWER BONDS TO DISPOSE OF, AND DEFENDANT
REQUESTED PLAINTIFF TO SUBMIT A BID THEREFOR; THAT ACCORDINGLY ON
SAID DATE, PLAINTIFF AS NEW YORK SUBMITTED BY TELEGRAM A BID TO
DEFENDANT AT CHICAGO FOR THE PURCHASE OF THE BONDS, AS FOLLOWS
(EXHIBIT ATTACHED):
"We bid you for approximately \$2,300,000 Village of Wilmette
six per cent. sewer bonds, maturing from one to twenty years,

ninety-three (93) cents (dollars) and accrued interest for each one hundred dollars par value of bonds. This bid subject to legal opinion Chapman and Cutler, Chicago. You placing fund of five per cent. of par value of bonds accepted by us with only preliminary legal opinion, to be returned to you when final is rendered. Also subject to the inspection and approval of the district by our Mr. Keller; district to have a five per cent. reserve cushion. Bonds deliverable approximately over ten months' period. This bid good only if you acknowledge acceptance of same, advising that if you are successful bidder you will agree to these terms. This acceptance must be received no later than noon, Tuesday, April 29th."

And plaintiff further alleged that on April 29th, and prior to noon of that day, plaintiff received from defendant an acceptance by telegram of said bid, as follows: "Your wire re Wilmette Bonds accepted. Will advise you tomorrow if we are successful."

And plaintiff further alleged that on April 30th, it was mutually agreed between the parties that said bonds were to be delivered to plaintiff by defendant pursuant to the terms of the bid and acceptance, although the bid for said contract for the construction of said sewer system "had been submitted in the name of Cannell-Conrad Construction Co."; and that the mutual agreement (in this paragraph referred to) "was confirmed in writing by defendant by letter," dated May 1st and received by plaintiff on May 2nd, as follows:

"This will confirm our conversation (over telephone) of yesterday relative to the Wilmette Bonds. It is our understanding that it is agreeable to accept these bonds through us in accordance with the commitment of April 28th, notwithstanding the fact that the contract for execution of the work for the Village of Wilmette will be in the name of Cannell-Conrad Construction Co. This contract is to be awarded in the Village May 6th, at 7:30 o'clock p. m., daylight saving time."

And plaintiff further alleged that on May 6th, 1930, the contract for the construction of the sewer system was awarded to the Cannell-Conrad Construction Co., and that immediately thereafter, and late in the evening of May 6th, Delmar C. Gee, for defendant, telegraphed to Herbert Keller, president of plaintiff, at New York, as follows: "Awarded contract tonight. Try and leave

Wednesday, arriving here Thursday morning. Wire."

And plaintiff further alleged that immediately thereafter plaintiff proceeded to conduct an inspection of the district (wherein the sewer system was to be constructed) by its agents including said Heller; that within approximately a week that inspection was completed; that thereupon plaintiff notified defendant that "said district was approved, and that plaintiff was ready to take said bonds, with the opinion of Chapman and Cutler as aforesaid"; that defendant, however, failed and refused to carry out and perform the terms of its agreement with plaintiff, and defendant contracted to sell the bonds to other investment security dealers; and that "it has sold said bonds to said other dealers," to plaintiff's damage in the sum of \$150,000, etc.

Accompanying plaintiff's declaration is the affidavit of its president, Herbert C. Heller, to the effect that plaintiff's demand is for damages suffered by it "by reason of the failure and refusal of defendant to fulfill its contract with plaintiff, as more fully set forth in plaintiff's declaration, -- said damages consisting of the difference between the purchase price for said bonds as provided by said contract, and the price at which plaintiff could have sold said bonds, less the expenses incident thereto"; and that "said net profit" (specifying a particular sum) is due to it from defendant, after allowing all just credits, deductions and set-offs.

To plaintiff's declaration defendant filed a plea of the general issue, and to the special count a further plea, alleging that subsequent to May 1, 1930, and on or about May 10th, "plaintiff refused to accept said bonds in accordance with the terms of its telegram of April 28th, but demanded a ten per cent. reserve cushion, and refused to accept the bonds upon the placing of a

fund of a five per cent. cushion"; and that defendant, upon plaintiff so refusing to carry out the terms of the contract, sold the bonds to persons other than plaintiff, "which defendant would not have done if plaintiff had not refused to complete said contract upon the placing of a five per cent. cushion." Accompanying these pleas is defendant's affidavit of merits, by John J. Dowdle, its secretary, making substantially the same allegations as in said further plea, and further alleging that by plaintiff's actions "the contract was broken and cancelled by plaintiff and not by defendant," and that if plaintiff suffered any damages they "were caused by plaintiff's failure to take the said bonds upon a five per cent. cushion as agreed."

On the trial Herbert G. Heller was plaintiff's principal witness. Herbert G. Ford, plaintiff's "field representative," also testified and plaintiff introduced certain writings, including those mentioned in its declaration. Defendant's principal witness was Delmar C. See, a Chicago broker in special assessment bonds and defendant's representative in the negotiations with Heller and others. For defendant, John J. Dowdle, its secretary, testified, as did J. E. Conrad, treasurer of Cannell-Conrad Construction Co., and Holland E. Cassidy, a Chicago attorney specializing in municipal bond matters.

As to the technical meaning of the term "cushion," in connection with municipal bonds, Heller testified that "a cushion is the amount of the tax levied against a district in excess of that which is required to pay the full interest and principal of the bonds as they mature, and that amount which is greater than is required to pay for the interest and principal is considered a cushion or reserve fund." Cassidy testified:

"The matter of 'cushion', or adequate reserve, is something which I, as an attorney passing upon municipal bond issues, must

...of a five per cent. premium; and that defendant, upon signing
itly as relating to entry and the terms of the contract, said the
bonds to persons other than plaintiff, "which defendant would not
have done if plaintiff had not refused to complete said contract
upon the signing of a five per cent. premium." Accompanying these
pieces is defendant's affidavit of service, by John T. Bowdler, its
secretary, stating substantially that some allegations as to said
written piece, and further alleging that by plaintiff's actions
"the contract was broken and completed by plaintiff and not by de-
fendant," and that if plaintiff returned any damages they "were
caused by plaintiff's failure to take the said bonds upon a five
per cent. premium as agreed."

On the trial Herbert G. Heller was plaintiff's principal
witness. Herbert G. Heller, plaintiff's "chief representative," also
testified and plaintiff introduced certain writings, including
those mentioned in the declaration. Defendant's principal witness
was William C. Gee, a Chicago broker in special assessment bonds
and defendant's representative in the negotiations with Heller and
others. The defendant, John T. Bowdler, its secretary, testified,
as did J. T. Cooper, President of Council-Grange Association No. 1,
and William M. Guesbly, a Chicago attorney specializing in municipal
bond matters.

As to the technical meaning of the term "premium," in con-
nection with municipal bonds, Heller testified that "a premium is
the amount of the fee paid against a debenture in excess of that
which is required to pay the full interest and principal at the
maturity of the maturity, and that amount which is greater than is re-
quired to pay for the interest and principal is considered a premium
or premium fund." Guesbly testified:

"The matter of 'premium,' or amount received, is something
which I, as an attorney practicing upon municipal bond issues, must

give heed. ** These particular bonds were payable only out of the assessments. Ordinarily, there is more interest expended on the bonds than there is collected. In the ordinary job it runs about 6 per cent, but, of course, there are always minor losses on account of errors in computations and collections; so that on a job of this type you find the average losses about 7 per cent.,-- a little more or a little less. The mathematical computation of it is 6 per cent., so that with a 5 per cent. cushion for the interest deficiency fund, your bonds will not pay out in full. In other words, there is not enough money there to satisfy the obligations. It was my opinion at that time that a 10 per cent. cushion would be safe, but as the facts developed that was not even enough. However, that was my view then and I told them so."

Dawdle, defendant's witness, testified that defendant was one of the bidders for the Wilmette sewer contract; that it had no contract arrangements with the Cannell-Conrad Co.; that defendant did not receive any of the Wilmette bonds or anything out of their ^{and} issue; that defendant has had several contracts on which special assessment bonds were issued. J. B. Conrad, defendant's witness, testified that in April and May, 1930, and thereafter, he was the secretary and treasurer of the Cannell-Conrad Co., which was engaged in the contracting business; that he put in a bid for the contract for the Wilmette sewer; that he was the low bidder and the contract was awarded to him; and that defendant company had also put in a bid for the contract.

From the testimony of defendant's witnesses, Gee, Conrad and Cassidy, corroborated in many particulars by the testimony of plaintiff's witnesses, Heller and Ford, the following facts in substance appear: Prior to April 28, 1930, the Village of Wilmette had advertised for bids for the construction of the sewer system,-- the cost to be paid for in special assessment bonds. Defendant desired to make a bid for the work, and, prior to making it, sought to obtain from a responsible party a binding commitment for the purchase of these bonds which defendant might receive in payment for its work, in case its bid was accepted and it secured the contract, and it employed Gee, the broker, to obtain such a commitment, etc., who thereafter personally negotiated with Heller in New York

city. After Gee's return to Chicago and after some long distance telephone conversations, plaintiff submitted its said conditional offer, as contained in its telegram of April 28th, to buy the bonds at 93 cents on the dollar, and defendant accepted the offer by its telegram of April 29th. On the following day Gee had another telephone conversation with Heller, which was followed by defendant's letter of May 1st. On May 6th the Village awarded the contract to the Cannell-Conrad Co., which was the lowest bidder, and plaintiff, advised of such awarding, at once started to cause the district, in which the proposed sewer improvement was to be made, to be inspected. Heller caused plaintiff's "field representative," Ford, to come to Chicago and make certain preliminary investigations, and on Monday, May 12th, Heller arrived in Chicago, and, in company with Gee, personally inspected the district. During the inspection trip Heller stated that there was more unimproved property in the district than he had expected to find. On the following day there was a meeting, at which Heller, Gee, Conrad and Cassidy were present. There was talk about plaintiff accepting the opinion of Cassidy instead of that of Chapman and Cutler, and much conversation was had as to the amount of the reserve cushion. Heller stated that he did not think that plaintiff could accept the bonds with a five per cent. cushion, and demanded a ten per cent. cushion. Conrad stated that, as plaintiff's offer mentioned a five per cent. cushion, he would not agree to a ten per cent. cushion. Cassidy stated that, as an attorney, he could not approve a five per cent. cushion and that he "would not write an approving opinion without a larger cushion fund." The question of the amount of the cushion was left unsettled and there was another meeting on the next day (May 14th) in Cassidy's office, and negotiations as to the amount of the cushion were resumed. At that meeting Heller and Ford were present; also Gee, Conrad and

After Lee's return to Chicago and after some long distance
travelling arrangements, Haislett contacted the said
offer, as contained in the telegram of April 20th, to pay the bonds
of \$5 cents on the dollar, and Haislett accepted the offer by the
telegram of April 21st. On the following day he had another tele-
gram communicated with Haislett, which was followed by Haislett's
letter of May 1st. On May 2nd the Chicago branch was contacted in
the Commercial-Trust Co., which was the interest holder, and Haislett,
instead of being satisfied, as once stated in some of the letters, in
which the proposed bond improvement was to be made, he had Haislett
Haislett stated Haislett's "first communication". "Well, to come in
Chicago was with certain preliminary investigation, and on Monday,
May 1st, Haislett arrived in Chicago, and, in company with Lee, per-
sonally inspected the district. During the inspection with Haislett
stated that there were some unimproved property in the district then
he had referred to him. On the following day there was a meeting
at Haislett Haislett, Lee, Conrad and Haislett were present. There was
talk about Haislett accepting the opinion of Haislett instead of
that of Chapman and Haislett, and much conversation was had as to the
amount of the reserve fund. Haislett stated that he did not wish
that Haislett could accept the bonds with a five per cent. condition,
and demanded a ten per cent. condition. Conrad stated that, as Haislett
Haislett's offer mentioned a five per cent. condition, he would not agree
to a ten per cent. condition. Haislett stated that, as an attorney, he
could not approve a five per cent. condition and that he would not
write an approving opinion without a ten per cent. condition. The
meeting at the amount of the condition was only mentioned and there
was another meeting on the next day (May 2nd) in Haislett's office.
and negotiations as to the amount of the condition were resumed. At
this meeting Haislett and Lee were present; also Lee, Conrad and

Cassidy. Gee testified: "Conrad asked Heller what conclusion he had come to and Heller said that he had not changed his mind, -- he would take the bonds on a ten per cent. cushion. Thereupon Conrad said: 'The deal is off'; * * and Conrad left the room." Gee's testimony is corroborated by that of Conrad and Cassidy. Heller testified in substance that he never actually refused to take the bonds with a five per cent. cushion. On the same day, and after said meeting, however, from plaintiff's Chicago office, Heller wrote defendant in part as follows:

"In accordance with our agreement regarding the Wilmette sewer bonds * *, we beg to advise you that since coming to Chicago last Monday we have been investigating this job * *. During the conversation with Mr. Gee and Mr. Conrad * *, we were willing to accept Holland Cassidy's opinion, and then got Clay & Dillon, of New York, to approve the bonds at our mutual expense.

During the course of conversation, Mr. Cassidy stated that in his opinion the bonds might be unsafe with a 5% cushion. We are this day taking the matter up with Chapman & Cutler, whose opinion you originally agreed to give us, and wish to go on record that we have not turned down the bond issue with this 5% cushion, and will not do so until we have the opportunity to investigate the matter thoroughly ourselves, * *. Therefore, we will advise you at the earliest possible moment our findings in this matter. You know that we made the proposition to sign up immediately, accepting these bonds with a 10% cushion, but, upon your refusal of this, have to make certain, through our investigations and our attorney's, that a 5% cushion is sufficient. We will * * advise you as soon as we have concluded our investigations whether we will accept same with a 5% cushion."

Plaintiff's evidence further disclosed that subsequent to said meeting of May 14th, at which Conrad declared the "deal" with plaintiff to be "off," the Cannell-Conrad Co. entered into a formal written agreement, dated May 15, 1930, with the Carleton D. Beh Co., of Des Moines, Iowa, whereby the former Co. agreed to sell and deliver to the latter Co., under stipulated terms, certain bonds issued by the Village of Wilmette for said sewer improvement "at the price of 95 cents on the dollar plus accrued interest." Plaintiff's evidence further disclosed that the Village thereafter issued sewer bonds to Cannell-Conrad Co., as contractor, in the total par value of \$1,311,000; and that of these bonds approximately \$800,000 were

Canally. He testified: "I don't know Heller what conclusion he had come to and Heller said that he had not changed his mind, -- he would take the bonds on a ten per cent premium. Thereupon Gertel said: 'The deal is off'; " and Gertel left the room. Gertel's testimony is corroborated by that of Gertel and Canally. Heller testified in substance that he never actually refused to take the bonds with a five per cent premium. On the same day, and after said meeting, however, from Plaintiff's Chicago office, Heller wrote defendant as set out below:

"In accordance with our agreement regarding the Village of New Berlin, -- I, as set out above, had been asked to Chicago last Monday we have been investigating this job --. During the investigation with Mr. and Mrs. Heller, we were willing to purchase the Village of New Berlin, and the City of Berlin, of the Village of New Berlin, at our usual terms. The source of information, Mr. Canally, stated that in his opinion the bonds would be about \$100,000. We are now taking the matter up with the Village of New Berlin, and you will agree to give us, not when to do so, but that we have not turned down the bond issue with this 10% premium, and will not do so until we have the opportunity to investigate the matter thoroughly ourselves. " Therefore, we will advise you as the earliest possible moment our thinking in this matter. You know that we made the proposition to sign up immediately, according to the terms of the agreement, but upon your refusal of this, we have to make certain, through our investigation and our attorney's, that a 10% premium is warranted. We will -- a while you are so we have decided our investigation would be very soon with a 10% premium."

Plaintiff's witness further disclosed that subsequent to this meeting of May 18th, at which Gertel declared the "deal" with Plaintiff to be "off", the Gertel-Gertel Co. entered into a formal written agreement, dated May 19, 1920, with the Village of New Berlin, Iowa, whereby the former Co. agreed to sell and deliver to the latter Co., some alleged bonds, which were issued by the Village of New Berlin for said sewer improvement "at the price of 25 cents on the dollar plus accrued interest." Plaintiff's witness further disclosed that the Village of New Berlin issued bonds to Gertel-Gertel Co., as counterparty, in the total par value of \$1,250,000; and that of these bonds approximately \$500,000 were

delivered in turn to the Carleton B. Beh Co., which paid for them at the rate of 95 cents on the dollar during a period of about a year, during which period the prevailing market price of the bonds was par. The amount claimed by plaintiff as damages is \$91,770, being the difference between the par value of the issued bonds, \$1,311,000, and the same number of bonds at 93 cents on the dollar, being the price bid by plaintiff in its telegram of April 28, 1930.

Plaintiff's counsel, in urging a reversal of the trial court's judgment, contend in substance (1) that plaintiff's telegram of April 28, 1930, and defendant's reply telegram of April 29th, "as modified by the subsequent mutual agreement of the parties" (evidently referring to defendant's letter of May 1, 1930), constituted a binding contract for the sale by defendant to plaintiff of the bonds in question at the price of 93 cents on the dollar; and (2) that defendant breached said contract by its failure to deliver to plaintiff such bonds as were issued by the Village of Wilmette, to plaintiff's damage as claimed. We cannot agree with either contention. Plaintiff's offer or bid, as contained in its telegram of April 28th, cannot be considered as an unqualified one. It was made subject to (a) the legal opinion of Chapman & Cutler; (b) the inspection and approval of the district by plaintiff's president, Heller; and (c) the district was "to have a 5% reserve cushion." And in accepting the conditional offer by wire, defendant did so on condition that "we are successful." It is clear to us that, prior to Heller's inspection of the district and plaintiff's obtaining a satisfactory opinion, the parties did not intend to make a binding contract as regards the bonds to be issued by the Village, but that it was the intention, after said inspection and approval of the district had been made and the satisfactory opinion of a qualified attorney had been given, that a formal contract would be drafted and executed by the parties.

delivered in turn to the Davidson B. Koh Co., which paid for them at the rate of 25 cents on the dollar during a period of about a year, during which period the prevailing market price of the goods was 25 cents. The amount claimed by plaintiff as damages is \$81,770, being the difference between the net value of the goods sold, \$2,311,000, and the same number of pounds at 25 cents on the dollar, being the price bid by plaintiff in its telegram of April 22, 1930.

Plaintiff's counsel, in giving a recital of the facts in its petition, recited in substance (1) that plaintiff's telegram of April 22, 1930, and defendant's reply telegram of April 23, 1930, was mailed by the defendant without agreement of the parties (evidently not trying to defendant's letter of May 1, 1930), constituted a binding contract for the sale by defendant to plaintiff of the goods in question at the price of 25 cents on the dollar; and (2) that defendant's counsel told plaintiff of the fact that such goods as were located by the Village of Chicago, to plaintiff's damage as claimed. It further stated that plaintiff's counsel, ELWOOD H. BROWN JR., on September 1, 1930, advised by counsel as an authorized one. It was made subject to (a) the legal opinion of Chapman & Cutler; (b) the inspection and approval of the Village of Chicago; and (c) the approval of the Village of Chicago. And in accepting the conditional offer by wire, defendant did so on condition that "we are successful." It is clear to us that, prior to Keller's inspection of the goods and plaintiff's obtaining a satisfactory opinion, the parties did not intend to make a binding contract as regards the goods to be issued by the Village, but that it was the intention after said inspection and approval of the Village had been made and the satisfactory opinion of a qualified attorney had been given, that a formal contract would be drafted and executed by the parties.

That such a course of action is usual and customary is evidenced by Heller's testimony, given on cross-examination. He testified: "I have bought a lot of special assessment bonds over a period of 10 years; that is practically my exclusive business; it is customary when we make a purchase like this to have a formal contract prepared; no formal contract was prepared in this instance."

Furthermore, it clearly appears that Heller, himself, did not consider that a binding contract had been entered into by said preliminary telegrams and letter. After he had arrived in Chicago and had carefully inspected the district and further negotiations were in process, he demanded a ten per cent. cushion instead of a five per cent. cushion, as in the offer or bid of April 28th plaintiff had proposed. This change in the proposition was not agreeable either to defendant or the Cannell-Conrad Co. (to which the Village had awarded the contract), and as a result, and upon Heller's continuing to insist on a ten per cent. cushion, defendant and the Cannell-Conrad Co. refused to negotiate further and declared that the deal was "off." We fail to find in the present record evidence, on the part either of defendant or the Cannell-Conrad Co., of "welching" as contended, but we do find evidence of such action on the part of plaintiff's president, Heller, and that his action and position, taken as to the amount of the cushion, was the sole reason why a final and satisfactory contract was not executed between the parties, or between plaintiff and the Cannell-Conrad Co., relative to said bonds subsequently to be issued by the Village of Wilmette.

Our conclusion is that the circuit court, under all the facts and circumstances in evidence, was fully warranted in making the finding and entering the judgment appealed from. Accordingly, the judgment will be affirmed.

AFFIRMED.

Scanlan, P. J., and Sullivan, J., concur.

That such a course of action is usual and customary is evidenced
by Heller's testimony, given on cross-examination. He testified:
"I have bought a lot of special assessment bonds over a period of
10 years; that is practically my exclusive business; it is an ex-
traordinary thing when we make a purchase like this to have a formal contract
drawn; no formal contract was prepared in this instance."
Furthermore, it clearly appears that Heller, himself, did not con-
sider that a binding contract had been entered into by said pro-
cessary telegrams and letter. After he had arrived in Chicago
and had carefully inspected the district and further negotiations
were in process, he demanded a 100 per cent. cash instead of a
100 per cent. cash, as is the case in all of our other cases.
This had occurred. This change in the proposition was not agree-
able either to defendant or the Cannel-Corpus Co. (to which the
Village had awarded the contract), and as a result, and upon
Heller's continuing to insist on a 100 per cent. cash, defendant
and the Cannel-Corpus Co. refused to negotiate further and de-
clared that the deal was "off." We fail to find in the present
record evidence, on the part either of defendant or the Cannel-
Corpus Co., of "voluntariness" as contended, but we do find evidence of
such action on the part of plaintiff's president, Heller, and that
his action and position, taken as to the amount of the cash, was
the sole reason why a final and satisfactory contract was not ex-
ecuted between the parties, or between plaintiff and the Cannel-
Corpus Co., relative to said bonds and interest to be issued by
the Village of Milwaukee.
Our conclusion is that the circuit court, under all the
facts and circumstances in evidence, was fully warranted in making
the finding and entering the judgment reported here. Accordingly,
the judgment will be affirmed.

ATTESTED:
Clerk, U. S. and Milwaukee, W. J. Connor.

36297

GEORGE J. WILLIAMS,
Appellant,

v.

LOUIS SCHWARTZ,
Appellee.

5 / A
APPEAL FROM MUNICIPAL
COURT OF CHICAGO.

270 I.A. 622³

MR. JUSTICE GRIDLEY DELIVERED THE OPINION OF THE COURT.

On June 13, 1932, plaintiff caused a judgment by confession for \$352.50 to be entered against defendant on a written lease. The amount claimed was \$500 and the sum of \$52.50 was included in the judgment as attorney's fees. Subsequently, on defendant's verified petition, the court ordered that the judgment be opened and defendant be given leave to defend, that the petition stand as an affidavit of merits, and that the judgment as confessed stand as security, etc. During the trial without a jury in July, 1932, and after both parties had introduced evidence, defendant, by leave of court, filed an amended affidavit of merits, and the court found the issues against plaintiff and entered judgment against him for costs. The present appeal followed.

On the trial plaintiff, without objection, introduced the original lease in evidence. It is dated March 10, 1930, is on a printed form filled in with typewriting, and is signed by plaintiff and by "Louis Schwartz." By it plaintiff, as lesser, leased to Schwartz, as lessee, an apartment on the second floor of a building known as 5052 Woodlawn avenue, Chicago. The term is from May 1, 1930 until April 30, 1931, with the following proviso:

"Provided either of the parties to this lease shall have given to the other, three months before said last mentioned date, notice in writing of his or her intention to terminate this

lease on said last mentioned date, otherwise this lease shall continue in force for another term of one year, and in the same manner from year to year, including all covenants and conditions therein, until one of the said parties shall terminate this lease by like notice in writing in some ensuing year in manner aforesaid, which said notice shall terminate this lease at the end of the year for which said premises are then held."

In consideration of the demise, the lessee covenants and agrees inter alia "to pay as rent for said demised premises annually the sum of \$2100, payable in monthly installments of \$175 per month in advance upon the first day of each and every month during the life of this lease, at the office of George J. Williams, 1435 E. 60th street." The lessee's other covenants are those commonly found in such instruments. One of them is that "he has examined and knows the condition of said premises and has received the same in good order and repair, except as herein otherwise specified, * * and upon the termination of this lease, in any way, will yield up said premises to said lessor in as good condition as when the same were entered upon by said lessee, ordinary wear and tear only excepted." And there is the usual clause authorizing the entry of a judgment by confession against the lessee at any time for rent due and unpaid, together with "a reasonable sum, but at no time less than \$50, for plaintiff's attorney's fees." Immediately above the signatures is the statement: "Decorating list attached," and said list, attached as a rider, is as follows:

Decorating for Second Apartment at 5052 Roadlawn Avenue.

Calcimine ceilings throughout excepting bathrooms and kitchen paint.
Front sunparlor paint brick and woodwork; caulk openings around window frame.
Living room - paper; wash woodwork.
Dining Room - paper border; wash woodwork.
Hall closet - painted.
Long hall - papered; woodwork painted.
First chamber paper and paint woodwork.
Second chamber paper and paint woodwork.
Third chamber paper and paint woodwork.
Fourth chamber paper and paint woodwork.
Place radiator between west windows.
Back sunparlor - painted.
Kitchen and butler pantry painted including woodwork.
Maid's room papered.

James an early and successful life, otherwise this would have been a failure. It is true that the early years of his life were not without their share of adversity, but the conditions of his youth, including all reverses and disappointments, were not of the nature of those which would have led to the failure of his career. It is true that he was not without his share of adversity, but the conditions of his youth, including all reverses and disappointments, were not of the nature of those which would have led to the failure of his career.

In consideration of the terms, the income tax

and agree that this "to pay as rent for said certain business

amounting the sum of \$1000, payable in monthly installments of fifty

per month is to be paid upon the first day of each and every month

during the life of this lease, at the office of George J. Williams,

1115 N. 4th Street." The lease's other provisions are those

usually found in such instruments. One of them is that the lessee

shall not have the privilege of subletting or assigning the lease

the same in good order and repair, except as herein otherwise agreed.

That, if the lessee shall fail to pay the rent as herein provided

the same shall be deemed to be in default and the lessor may

thereupon re-enter the premises and let the same at such price

and upon such terms as he may think fit, and the lessee shall

be bound to pay the same rent as if the premises had not been

so re-let, and the lessee shall be bound to pay the same rent

as if the premises had not been so re-let, and the lessee shall

be bound to pay the same rent as if the premises had not been

so re-let, and the lessee shall be bound to pay the same rent

as if the premises had not been so re-let, and the lessee shall

be bound to pay the same rent as if the premises had not been

so re-let, and the lessee shall be bound to pay the same rent

as if the premises had not been so re-let, and the lessee shall

be bound to pay the same rent as if the premises had not been

so re-let, and the lessee shall be bound to pay the same rent

as if the premises had not been so re-let, and the lessee shall

be bound to pay the same rent as if the premises had not been

so re-let, and the lessee shall be bound to pay the same rent

All closets calcimined and radiators painted.
New gas stove; bars repaired on rear windows.
Floors varnished or painted throughout as needed.
Crystal Chandeliers for reception room. Sun parlor,
dining room.

All painted woodwork painted ivory.
Repair bathroom ceilings.
Replace and clean all shades.

In defendant's verified petition, upon the strength of which the court opened the judgment and ordered that the petition should stand as an affidavit of merits, he alleged that the confessed judgment "was entered upon a certain lease executed on March 10, 1930, in which the plaintiff herein was the lessor and the defendant the lessee;" that the confessed judgment, less the attorney's fees, "was for rental accruing after April 30, 1931, - the expiration date under the terms of the lease," and that the confessed judgment is "without authority of law." And he alleged, "as a further defense," that, "in the month of March, 1931, inasmuch as the lease provided that plaintiff should decorate, repaint and varnish the premises, and inasmuch as plaintiff was unable at the time so to do," plaintiff and defendant entered into an agreement that, "in consideration of defendant waiving his right of insisting upon said decorating, plaintiff agreed to reduce the rental in the sum of \$300, which is the amount herein sued for."

Upon the defenses, as above stated, the cause came on for hearing in July, 1932. It was agreed by respective counsel that at no time prior to April 30, 1931, had any written notice been served by either party upon the other terminating the lease on April 30, 1931, as mentioned in the proviso of the lease above referred to, and it appeared that defendant and his wife had continued to occupy the premises as a residence until about April 30, 1932. It was plaintiff's theory that, inasmuch as the lease had not been terminated on April 30, 1931, by notice as provided, it became in effect a two-year lease, expiring April 30, 1932.

All claims relating to the
the same were
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the same were

The defendant's version of the events of
which the court found the plaintiff and defendant
was in an effort to prove the plaintiff's
judgment was correct upon a certain issue raised in 1901,
1902, in which the plaintiff Keweenaw was the owner of the
the plaintiff, that the defendant judgment, from the plaintiff's point
"and the plaintiff's judgment of 1901, 1902, - the defendant
this was the issue of the plaintiff, and that the defendant judgment
is "entirely contrary to fact," and the plaintiff, "and a further
defendant," that "in the month of March, 1901, defendant on the issue
provided that plaintiff's version of the events, which the plaintiff
was not, and defendant on plaintiff was unable to do so as to do,"
plaintiff and defendant entered into an agreement that, "in con-
sideration of defendant's waiving his right of instituting upon said
defendant, plaintiff agreed to release the plaintiff in the sum of
\$100,000 to the plaintiff's order." -
Upon the release, as above stated, the same was
the plaintiff on July, 1902. It was agreed by the plaintiff's counsel
that as the plaintiff's order of July 25, 1901, and the plaintiff's
was agreed by the plaintiff's order upon the release of the plaintiff
on July 25, 1901, as defendant in the plaintiff of the issue above
stated, and as defendant's order was not the plaintiff's order
plaintiff to receive the plaintiff's order as a plaintiff's order of July
25, 1901. It was plaintiff's order that, defendant on the issue
and the plaintiff's order on July 25, 1901, by which the plaintiff
it stands in effect a plaintiff's order, plaintiff's order of July 25, 1901.

under the stipulated rental of \$175 a month. This theory is in accord with several decisions of appellate courts of this district. (See Williams v. Veeder, 195 Ill. App. 413, 414; Morris v. Taylor, 199 id. 588, 591-2.)

Plaintiff was a witness in his own behalf and his secretary and stenographer, Hazel Anderson, testified for him. Notice to produce certain original letters from plaintiff to defendant, dated May 4th, June 2nd and July 6th, 1931, was served upon defendant prior to the trial, but the originals were not produced and carbon copies of them were admitted in evidence, after proof had been made of the originals having been dictated and signed by plaintiff and duly mailed. Plaintiff testified on direct examination that his business was that of managing and taking care of his own real estate; that he had never met defendant personally "before today;" that he had two offices - the main one being at 1435 East 60th street, Chicago; that defendant regularly paid the stipulated rent of \$175 a month up to and including the month of April, 1931; that during the following year he paid only \$150 a month; that the checks for the rent were duly received by plaintiff and credited on defendant's account; that he wrote letters to defendant, concerning the rental payments of only \$150 a month, in May, June and July, 1931; and that in May, 1932, after defendant had vacated the premises, he received two letters from defendant, dated, respectively, May 14th and 18th, 1932. These two letters were offered in evidence on the theory that they contained material admissions by defendant, but the court refused to admit them. The copies of plaintiff's letters to defendant of May 4th, June 2nd and July 6th, 1931, are as follows:

(May 4th). "Your check for \$150 on account of May rent has been received. Kindly let me have a check for the remaining \$25. * *"

(June 2nd) "As you know, your rent for your apartment is \$175 per month. Last month you remitted \$150, which I have credited on account of May rent, leaving a balance of \$25. Your

check today for \$150 has been received, and I have credited \$25 on account of May rent and \$125 on account of June rent, leaving a balance on June rent of \$50, which you will kindly remit and oblige."

(July 6th) "You do not appear to have any respect for your lease of your apartment. The rent as you know is \$175 per month, and yet you continue to send a check for \$150. This I have instructed my cashier to credit \$50 on account of June rent and \$100 on account of July rent, for which you will please send me checks; otherwise sooner or later this is going to land in court."

It does not appear that subsequent to July, 1931, and until April 30, 1932, plaintiff wrote any similar letters to defendant. Plaintiff, however, testified that during May, 1932 (after defendant had moved out of the premises), he wrote several letters to defendant, demanding \$300 for balance due for rent. He offered in evidence a copy of a letter written by him to defendant on May 6, 1932, in which was enclosed an account, showing a balance due of \$300, and in which it is stated: "Kindly let me have your check within five days for the same, otherwise I shall confess judgment under the lease," etc. Upon the objection of defendant's attorney that the letter amounted merely to a demand for payment, after the termination of the lease and prior to the judgment as subsequently confessed, the court refused to admit said copy.

On cross-examination plaintiff testified in substance that he "handles the building himself;" that he signs all leases himself; that he has an agent, named Stuart, who negotiates leases and "brings them to me to sign," but who is not authorized to "bind me" by any contract; that Stuart supervises the making of all repairs, and decorations, which have been agreed to by him (plaintiff); that the decorations mentioned in the lease were done shortly after the making of the lease in 1930; that Stuart never spoke to him about making any new decorations in defendant's apartment in May, 1931, or about that time; and that it is not customary for him (plaintiff) to decorate apartments each year, although "there have been occasions when there has been decorating done every year."

At this stage in the trial plaintiff's attorney stated that the repairs mentioned in the rider on the lease were "made by the landlord and amounted to more in value and in cost than \$1,000" and that he would "concede that none of these repairs mentioned in this rider were made again the next year." Thereupon defendant's attorney moved the court for a finding in defendant's favor on the ground that "plaintiff did not carry out the terms of the lease in that he did not decorate the apartment in 1931." The court denied the motion and directed defendant to put in proof to sustain his defense, as alleged in his verified petition or affidavit of merits, (i. e., to the effect that about the time of the beginning of the second year of the lease the parties, in consideration of no new decorations being made, agreed that there should be a reduction in the rental for that year in the sum of \$300.) Thereupon defendant took the stand but he failed to show that any such agreement was made. He testified in part that he had lived at 5052 Woodlawn avenue "for 12 years," and that plaintiff "was my landlord for about 5 or 6 years;" that he "didn't remember" receiving plaintiff's letters to him of May 4th, June 2nd, and July 6th, 1931, copies of which had been introduced in evidence; and that after the lease in question had been signed "he returned it to Mr. Stuart." He then was asked: "Q. At the time you signed the lease, did you understand that it was a lease for a year or for more than one year?" Over plaintiff's objection, the court allowed him to answer that "the last lease was not signed for two years; it was supposed to be for one year." Upon being shown the lease sued upon, and upon his attention being directed to the signature "Louis Schwartz" thereon, he testified: "That is not my signature; that is my wife's signature." Thereupon defendant's attorney asked leave to file an "amended affidavit of merits," and, upon the court granting the motion, defendant thereafter filed such a paper, signed and sworn to by

At this stage in the trial plaintiff's attorney stated that the repairs mentioned in the letter on the lower were "made by the landlord and amounted to more in value than in cost than \$1,000" and that he would "concede that none of these repairs mentioned in this letter were made again the next year." Thereupon defendant's attorney moved the court for a finding in defendant's favor on the ground that "plaintiff has not carried out the terms of the lease in that he did not reproduce the apartment in 1931." The court found the motion and directed defendant to put in proof to establish his defense, as alleged in his verified petition or otherwise at another time. At the effect that about the time of the beginning of the second year of the lease the parties, in consideration of no new decorations being made, agreed that there should be a reduction in the rental for that year in the sum of \$500. Thereupon defendant took the stand but he failed to show that any such agreement was made. He testified in fact that he had given no such reduction of rent in 1931, and that plaintiff "was my landlord for about 2 or 3 years." That he "knew" plaintiff's attorney's motion as to the fact that the court had been instructed in defendant's favor after the lease in question had been signed "is true." He then testified that he signed the lease, did not understand it at the time he signed the lease, did not know what it was a lease for a year or for more than one year. That plaintiff's objection, the court allowed him to answer that "the last lease was not signed for two years; it was supposed to be for one year." Upon being asked the lease was signed and given him defendant being directed to the statement "lease for one year" he testified: "That is not my agreement; that is my wife's statement. Thereupon defendant's attorney asked leave to file an affidavit of service, and, upon the court granting the motion, defendant thereupon filed such a report, signed and sworn to by

defendant, in which the sole defense stated to plaintiff's action is that "he denies that the lease upon which judgment was confessed in this suit was signed by this defendant, and defendant further says that the said signature 'Louis Schwartz', appearing on said lease, is not the handwriting of this defendant." Thereupon the court entered the finding and judgment against plaintiff as first above mentioned.

After a careful review of the record we are of the opinion that the court erred in making the finding and in entering the judgment. We think that the court should have ordered that the judgment against defendant for \$352.50, as confessed on June 13, 1932, should stand confirmed as of that date. The judgment as confessed was ordered to be opened because of the claimed defense as set forth in defendant's verified petition, which petition was ordered to stand as his affidavit of merits. Upon the trial he was unable to establish that defense. Furthermore, when he filed his "amended affidavit of merits" (not an amendment to the same), he abandoned that defense and substituted a new and different one therefor. (See 49 Corpus Juris, sec. 773, pp. 558-9.) And we do not think that there is any merit in that new defense. It may be that defendant's wife actually signed his name to the lease, but it clearly appears from his own testimony, as well as plaintiff's, that he adopted the lease as his own, just as if he had actually signed it, and his attempted repudiation of it should not have been permitted. (See Baragiano v. Villani, 117 Ill. App. 372, 375-6; Henderson v. Virden Coal Co., 78 Ill. App. 437, 442; O'Donnell v. Kelliher, 62 Ill. App. 641, 646; Walter v. Trustees of Schools, 12 Ill. 63, 64.)

For the reasons indicated the judgment appealed from is reversed and the cause is remanded to the municipal court, with directions to enter an order that the judgment of June 13, 1932, for \$352.50, as confessed against defendant, stand in full force and effect as of the date of its rendition.

REVERSED AND REMANDED WITH DIRECTIONS.

Seaulan, P. J., and Sullivan, J., concur.

52
A
36331

NATIONAL PAPER BOX CO.,
a corporation,

Appellee,

v.

PHILIP S. BLOOM CO.,
a corporation,

Appellant.

APPEAL FROM MUNICIPAL
COURT OF CHICAGO.

270 I.A. 622⁴

MR. JUSTICE SHILLEY DELIVERED THE OPINION OF THE COURT.

In a 4th class action in contract, tried without a jury on June 26, 1932, the court found the issues against defendant, assessed plaintiff's damages at \$995.63, and entered judgment against defendant in that sum. The present appeal followed.

In its statement of claim plaintiff alleged in substance that on August 27, 1931, the parties entered into a written agreement (copy attached as exhibit A) for the manufacture and sale by plaintiff, and the purchase by defendant, of 250,000 paper boxes, at the price of \$17.80 per thousand; that after purchasing materials, etc., for the manufacture of the boxes, and after manufacturing and delivering to defendant part of the entire order, defendant refused to pay for certain boxes received and also refused to accept the balance manufactured and to be manufactured; that plaintiff has always been, and is now, ready, able and willing to fully comply with its part of the agreement; and that by reason of defendant's said refusal and its breach of the agreement plaintiff has sustained damages in the total sum of \$995.63. (Itemized statement of damages attached as exhibit B.)

The agreement sued upon (admitted in evidence on the

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THE UNITED STATES DEPARTMENT OF JUSTICE

IN A CIVIL ACTION IN AND FOR THE DISTRICT OF COLUMBIA

JOHN EDGAR HOOVER, Plaintiff,

vs.

JOHN EDGAR HOOVER, Defendant.

Comes now the Plaintiff and

states that the Defendant is a person of the same name and

that he is a person of the same name and

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trial) is in the form of a written order, dated August 27, 1931, signed by defendant and accepted by plaintiff. By it plaintiff is directed to ship to defendant, at Chicago, "250 M" of the boxes at the price of "\$17.80 per M;" the size of the boxes is stated to be "13-3/16 x 7-3/4 x 1-1/2;" the color, "Bleached Manila;" the construction, "Glued Side Walls;" and the caliper (i. e., thickness of paper) "24 point." It is also stated: "Above to be taken out as wanted in lots of not less than 2,500 at a time; all to be taken out in one year from above date or sooner; above to be printed in two colors." Nowhere in the agreement is there any statement to the effect that the boxes are to be furnished in accordance with any submitted sample.

In its affidavit of merits defendant "denies that without cause or justification it refused to pay for the merchandise received by it and refused to accept the balance of the merchandise manufactured." And defendant "alleges that it entered into an arrangement with plaintiff to furnish it certain boxes in accordance with the sample exhibited by plaintiff;" that certain of the boxes delivered to defendant were in accordance with the sample; that thereafter plaintiff attempted to deliver boxes that were not in accordance with the sample, which defendant refused to accept; and that the boxes so tendered for acceptance were "inferior to the sample and wholly useless to defendant in its business." In the affidavit of merits there is no denial that, by reason of defendant's said refusals, plaintiff suffered the damages as alleged in its statement of claim. Furthermore, when during the trial defendant's attorney was asked if defendant was "questioning the claimed damages or simply confining its defense to the question of samples," he replied: "The defense is confined strictly to the question of sample."

On the trial two witnesses testified for plaintiff and three witnesses for defendant, and each party introduced certain documentary evidence. No useful purpose will be served in outlining the conflicting testimony, which we have carefully reviewed. Defendant sought to maintain its defense as alleged in its affidavit of merits, namely, in substance, that its refusal to accept the tendered boxes were justified because its agreement to purchase them was based upon a submitted sample and the boxes as tendered were not in accordance with, and were inferior to, the sample. In view of the provisions of the written agreement (wherein no suggestion is made of a sale by sample), and of all the evidence, the trial judge made the finding in plaintiff's favor, and we are unable to say that the finding is manifestly against the weight of the evidence, as defendant's counsel here solely contend.

For the first time in their reply brief defendant's counsel make complaint of the amount of the damages, as claimed by plaintiff and as awarded by the court. Counsel say: "While we realize we cannot take advantage on appeal for the first time on the question of the allowance of damages, we feel that the damages assessed are so unjust and so contrary to all rules of law relating to the measure of damages that this alone would be sufficient to justify the court in reversing this case and remanding it for a new trial." In view of defendant's sole defense as stated in its affidavit of merits and the statements made by its attorney on the trial as above mentioned, the question as to the amount of the damages awarded is not properly before us for consideration. Furthermore, in view of all the evidence we are unable to say that the damages ^{as awarded} are unjust or excessive.

The judgment of the municipal court should be affirmed and it is so ordered.

AFFIRMED.

Scanlan, P. J., and Sullivan, J., concur.

On the trial the witness testified that Plaintiff was
times witness for Defendant, and each party introduced evidence
in support of its case. The matter was heard in the
trial, the conflicting testimony, which we have carefully reviewed.
Defendant sought to maintain the defense as alleged in the affidavit
of merit, namely, in substance, that the witness so sought the
evidence from the Plaintiff because the Plaintiff is a person
known was based upon a admitted conflict and the boxes as handled
were not in accordance with, and were inferior to the goods.
In view of the provisions of the written agreement (wherein no
suggestion is made of a sale by sample), and of all the evidence,
the trial judge was of the opinion that Plaintiff's case, and we are
unable to say that the finding is manifestly against the weight
of the evidence, or defendant's counsel have clearly shown.
For the first time in their reply brief defendant's
counsel make complaint of the amount of the damages, as claimed
by Plaintiff and as stated by the court. Counsel say "this
is unfair to us, and we have no evidence on appeal for the first time
on the question of the amount of damages, we feel that the
amount assessed is so unjust and so contrary to all rules of
law relating to the measure of damages that this case would be
entitled to be treated as a matter of course and remanded
to the trial court." In view of defendant's sole defense as stated
in the affidavit of merit and the statements made by the attorney
on the trial in their submission, the question is in the amount of
the damages awarded is not properly before us for consideration.
Therefore, in view of all the evidence we are unable to say that
the damages are manifestly excessive.

as awarded

The judgment of the trial court should be affirmed
and it is so ordered.

1914

Respectfully,
J. J. McLaughlin, J. J. McLaughlin

35834

HARRY N. KRANZ,
Defendant in Error,

v.

L. J. KWAITKOWSKI, VIVIAN
KWAITKOWSKI, WILHELMINA C. J.
KOCH, LELAND W. KOCH, DOROTHY
HOCH, HARRY LANSEKI, ANNA MAE
LANSEKI, CHICAGO TITLE & TRUST
COMPANY, Trustee, under document
No. 8980695, ANDREW HANSON,
CHARLES E. NATHAN and THOMAS FISER,
Plaintiffs in Error.

ERROR TO

SUPERIOR COURT,

COOK COUNTY.

270 I.A. 622⁵

MR. JUSTICE SULLIVAN DELIVERED THE OPINION OF THE COURT.

November 17, 1928, Harry N. Kranz filed his bill of complaint to foreclose certain bonds, then past due, numbered 1 to 11, aggregating \$5,500, part of a serial bond issue of \$140,000, secured by a trust deed conveying property known as "Loyola Mansions," 1235 Loyola avenue, Chicago.

The bill alleged that one John L. Lukanitsch was the holder and owner of \$5,500 past due bonds, all the past due interest coupons which were payable July 6, 1928, and which amounted to \$4,200 and \$4,200 of interest coupons maturing January 6, 1929, and that he was also the owner of additional bonds, all aggregating \$15,500, or more than ten per cent of the entire bond issue.

The bill further alleged that the said Lukanitsch requested the trustee, Harry N. Kranz, complainant in the bill filed in the Superior court, to institute foreclosure proceedings and that by the filing of the suit, the past due indebtedness in the amount of \$9,700 became subordinated to the balance of the bond issue not yet due and that the title to the premises was vested in L. J. Kwaitkowski and Vivian Kwaitkowski, two

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of the plaintiffs in error, who were defendants below, as joint tenants. Wilhelmina C. J. Koch, Leland W. Koch and Dorothy Koch were also made parties defendant to the bill.

An order was entered June 21, 1929, that the bill be taken pro confesso by and against the above named defendants.

After reference and consideration of the master's report a decree of foreclosure and sale was entered by the chancellor. Upon the master's report of sale and distribution of the proceeds, a decree was entered confirming the sale of the premises and distribution and approving same subject to the continuing lien of the trust deed for the remaining bonds, numbered 12 to 220, both inclusive, of the same issue, which were secured by the same trust deed.

The master's report of sale approved by the decree reported that the proceeds of the sale were sufficient to pay the amount due complainant in the foreclosure proceedings, together with all costs and expenses and the decree found that there was no deficiency.

Plaintiffs in error ask for a reversal or modification of the decree in this case because of the following findings contained therein:

"And it further appearing that divers other obligations have accrued subsequent to filing of the bill herein in connection with said bonds 12 to 220, both inclusive, which have not been paid and that said complainant is in possession of said premises pursuant to terms of said trust deed and of an assignment of rents by the owners of said premises and is collecting rents from said premises and applying net rentals against deficiencies under said trust deed which have accrued subsequent to the filing of the bill herein and which are not included in the decree rendered herein:

"IT IS, THEREFORE ORDERED, ADJUDGED and DECARED that said complainant as such trustee is entitled to the possession of said premises until all defaults under said trust deed in connection with said bonds 12 to 220, both inclusive, are remedied or removed."

It is admitted that there are no allegations in the bill of complaint and no evidence in the record upon which the above findings of the decree can be based.

L. J. Kwiatkowski and Vivian Kwiatkowski, owners of

of the plaintiffs in error, who were defendants below, as joint tenants. William C. B. Koch, Nelson W. Koch and Joseph Koch were also made parties defendant to the bill.

An order was entered June 21, 1930, that the bill be amended and amended by and within the above named defendants.

This reference and presentation of the matter's report a decree of foreclosure and sale was entered by the chancellor.

From the report's return of sale and distribution of the proceeds, a decree was entered confirming the sale of the premises and the

petition and approving same subject to the returning lien of the first mortgage and the remainder bonds, numbered 11 to 15, 1931.

Subsequent to the entry of the decree, which was entered by the same court, the following facts were ascertained:

The master's report of sale approved by the decree reported that the proceeds of the sale were sufficient to pay the amount due

claimants in the foreclosure proceedings, together with all costs and expenses and the decree found that there was no deficiency.

Wherefore the court has entered a judgment of satisfaction of the decree in this case because of the following findings:

That the plaintiff's report of sale approved by the decree reported that the proceeds of the sale were sufficient to pay the amount due

claimants in the foreclosure proceedings, together with all costs and expenses and the decree found that there was no deficiency.

Wherefore the court has entered a judgment of satisfaction of the decree in this case because of the following findings:

That the plaintiff's report of sale approved by the decree reported that the proceeds of the sale were sufficient to pay the amount due

claimants in the foreclosure proceedings, together with all costs and expenses and the decree found that there was no deficiency.

Wherefore the court has entered a judgment of satisfaction of the decree in this case because of the following findings:

the equity of redemption in the foreclosed premises, Wilhelmina G. J. Koch, Leland W. Koch and Dorothy Koch, were on October 14, 1932, allowed an order of severance in this court and were granted leave to prosecute this writ of error solely in their own behalf.

For a determination of this proceeding it will be unnecessary to consider the decree as it affected the other defendants named therein.

The defendant owners of the equity of redemption contend that by the decree they were unlawfully deprived of the possession of the foreclosed premises and of the rents and profits therefrom during the fifteen month redemption period.

The indebtedness, which was the subject matter of the partial foreclosure in question, was extinguished by the sale. Inasmuch as that indebtedness was fully satisfied and there was no deficiency, neither the owners of the subordinated lien bonds, which by their subordination became in effect a second mortgage, and which were the subject matter of the foreclosure proceedings, nor the purchaser at the sale nor the trustee nor any other person acting for or in behalf of either of them could deprive the defendant owners of the equity of redemption or possession of the foreclosed premises and of the rents and profits therefrom during the redemption period.

Our attention is directed to many cases supporting the above doctrine. We agree that it is sound law and it is therefore unnecessary to refer to those cases as they have no application to the facts or law pertinent to the issues involved here.

It is contended that the owner of the equity of redemption is entitled to rents during the redemption period even against the prior mortgagee and cite Stevens v. Hadfield, 178 Ill. 532. This case properly held that the owner of the

equity of redemption was entitled to the rents during the redemption period because the owner of the first mortgage had taken no steps to enforce his rights.

The trustee in this case, according to the evidence, originally took possession of the premises and collected the rents under an assignment of rents to him by the owners of the equity of redemption for the purpose of obviating the necessity of the appointment of a receiver. This voluntary assignment executed by the owners of the equity of redemption, constituted a waiver of the demand for performance by the trustee as provided for in article 9 of the trust deed, which is as follows:

"In case of default (a) in the payment of principal of any bond (b) in the payment of interest on any bond, and such default continuing for thirty days, or (c) in the due observance or performance of any other covenants or conditions required in the trust deed, such default continuing for thirty days after demand for performance by the Trustee, or by the holder or holders of one or more of the bonds then outstanding then and in every such case the trustee may enter into and take possession of the mortgaged property with or without force, * * * collect rents and lease said premises in such parcels and for such times as the Trustee may deem proper. * * *"

Upon the entry of the decree approving the sale under the foreclosure and the distribution of the proceeds, the trustee had performed all duties owing from him to the owner of the subordinated lien bonds covered by the trust deed. That indebtedness was extinguished. But the Trustee in possession also owed a duty to the owners of all the other prior lien bonds.

Paragraph 4 of article 10 of the trust deed provided as follows:

"In case of any foreclosure sale of the mortgaged property, the principal sums of all bonds hereby secured, if not previously due, shall immediately thereupon become due and payable, anything in said bonds or in this Indenture to the contrary notwithstanding."

Acting under this and other provisions of the trust deed, the trustee in possession not only had the legal right to retain possession of the mortgaged property and collect the

of the trust, and the trustee is to be bound by the provisions of the trust instrument in relation to the management of the trust property.

The trustee in this case, according to the evidence, has not acted in conformity with the provisions of the trust instrument, and the court has found that the trustee has acted in breach of his duty. The court has therefore set aside the appointment of the trustee, and has appointed a new trustee in his place. The court has also ordered that the trustee be reimbursed for the expenses incurred by him in the management of the trust property.

The court has also ordered that the trustee be reimbursed for the expenses incurred by him in the management of the trust property. The court has also ordered that the trustee be reimbursed for the expenses incurred by him in the management of the trust property.

Upon the entry of the decree approving the sale under the foreclosure and the distribution of the proceeds, the trustee has retained all sales owing from him to the owner of the trust property. The court has found that the trustee has acted in breach of his duty in retaining the sales, and has ordered that the trustee be reimbursed for the expenses incurred by him in the management of the trust property.

Paragraph 4 of article 10 of the trust deed provided as follows:

"In case of any foreclosure sale of the mortgaged property, the principal sum of all moneys due by the mortgagor, shall immediately thereupon become due and payable, and the same shall be paid to the trustee of the trust, who shall hold the same for the benefit of the beneficiaries of the trust."

Under this and other provisions of the trust deed, the trustee in possession not only has the legal right to retain possession of the mortgaged property and to sell the same

rents therefrom for and in behalf of the other prior lien bondholders, but he would have been recreant to his trust if he had not done so.

In Altschuler v. Sandelman, 264 Ill. App. 106, we held that the trustee in possession is entitled to retain possession under the trust deed by its contractual provisions, while any defaults exist thereunder, and his interest cannot be adversely affected by the junior lien proceedings. This doctrine was supported by a number of cases cited therein.

Defendants contend that nowhere in the trust deed is the trustee or any bondholder authorized or permitted to foreclose a part of a bond issue. That partial foreclosures are permitted under our law admits of no argument. The case of the Central Trust Co. v. Calumet Co., 260 Ill. App. 410, and cases cited therein are conclusive on that proposition.

In Consumers Bond and Mortgage Company et al. v. David H. Eakin, 266 Ill. App. 141, this court held "aside from its contract right under the trust deed and, solely by virtue of its status as a first mortgagee, the latter, under the Illinois law, became the owner of the property after condition broken, subject only to an equity of redemption and as such owner was entitled to the physical possession of same."

From and after the entry of the decree confirming the master's sale and distribution of the proceeds of the sale, the trustee's possession of the premises was solely in the interest and behalf of the owners of the other prior lien bonds 12 to 220, both inclusive. The owners of the equity of redemption had defaulted and permitted the property to be foreclosed and sold, and therefore, under the terms of the trust deed the trustee was rightfully in possession. It was his duty to remain in

...and in behalf of the other party ...
...but he would have been ...
...not done so.

In *Albright v. Kunkel*, 100 Ill. App. 100, we said
...that the trustee in possession is entitled to ...
...under the trust deed by its contractual provision, while any
...otherwise exist ... and his interest ...
...attained by the trustee in possession. This doctrine was
...supported by a number of cases cited therein.

...trustee ... that ... in the trust deed is
...the trustee or any bondholder authorized or permitted to ...
...a part of a bond issue. That ...
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...*Trust v. ...* ...
...there is no ... in this disposition.

In *Trust v. ...*
...*Trust v. ...* ...
...contract ... the trust deed ...
...as a first mortgage; the latter, under the Illinois law,
...the owner of the property after condition broken, subject
...only to an equity of redemption and as such owner was entitled
...to the ... of ...

...and after the entry of the decree confirming the
...master's sale and distribution of the proceeds of the sale, the
...trustee's possession of the premises was solely in the interest
...and behalf of the owner of the other party ...
...been ... The owner of the equity of redemption had
...declined and permitted the property to be foreclosed and sold,
...and therefore, under the terms of the trust deed the trustee was
...rightfully in possession. It was his duty to remain in

possession.

The last two paragraphs of the decree as set forth supra added nothing to the rights and powers of the trustee. The decree confirmed in the trustee no rights and powers that were not already vested in him by reason of the trust deed and the law of the State of Illinois. Neither did the decree divest or deprive the defendants of any rights. The rights of all parties to this proceeding are exactly the same as if the two paragraphs of the decree complained of had not been incorporated in the decree. Therefore, that part of the decree must be considered as surplusage and the decree of the Superior court is affirmed.

AFFIRMED.

Scanlan, P. J., and Gridley, J., concur.

36043

CHICAGO REALTY SHARES, INC.,
a corporation,
Plaintiff in Error,

v.

FRANK T. JORDAN,
Defendant in Error.

ERROR TO MUNICIPAL
COURT OF CHICAGO.

270 I.A. 623

MR. JUSTICE SULLIVAN DELIVERED THE OPINION OF THE COURT.

September 22, 1931, plaintiff obtained a judgment for \$1665.28 by confession on three notes for \$497.13 each given plaintiff by defendant. September 25, 1931, defendant filed his appearance and petitioned the court to vacate the judgment and moved that his petition to vacate stand as affidavit of merits.

The court ordered that defendant's petition to vacate stand as affidavit of merits and the judgment was ordered to stand as security. The cause was tried before a jury which returned a verdict favorable to defendant and judgment of nil capiat was entered upon the verdict.

The undisputed evidence in the record proved that the three notes, each for \$497.13, and dated May 15, 1931, and due in thirty, sixty and ninety days, respectively, were executed and delivered by defendant to plaintiff in payment of past due rent, at the rate of \$239.50 a month, for seven months ending May 31, 1931, less an allowance or discount of 15%, on an apartment used and occupied by defendant in building owned by plaintiff at 216 East Pearson street, Chicago.

The substance of defendant's petition to vacate judgment and for leave to defend was that there was no consideration for

the execution of the notes sued on. Defendant sought to prove that when the notes in question were delivered, they were delivered on account of whatever rents, if any, should on an accounting between the parties appear to be due to plaintiff from defendant; that, notwithstanding the fact that they were unconditional in terms, they were delivered conditionally on such accounting being made from January, 1928, to May 15, 1931, the date of notes, to determine whether anything was due plaintiff from defendant on an agreement alleged by defendant to have been made with plaintiff, which provided that defendant was not to pay any more rent than any other tenant in the building.

Defendant testifying in his own behalf attempted and offered to prove the purported conditional delivery of the notes in question, and objection to his attempt and offer was sustained by the trial court.

Thereafter, on surrebuttal and without objection, defendant was permitted to present to the jury substantially all of the matters relied on by him to show conditional execution and delivery of the notes.

Giving due consideration to all evidence offered, presented by way of hearsay, or otherwise appearing in the record of the trial of this case, whether competent or incompetent, and whether received with or without objection of counsel, we must conclude that in the present state of this record we can find no evidence which indicates or tends to indicate with what person or persons, with or without authority to act for plaintiff, or under what conditions or circumstances, or at what time or place, any agreement binding in law was made for the conditional execution and delivery of the notes in question.

This record is not in such shape that the rights of

the execution of the notes such as... Defendant sought to prove
that when the notes in question were delivered, they were delivered
on account of whatever reason, it may, should on an accounting
between the parties appear as to how to distribute the proceeds
that, notwithstanding the fact that they were unconditional in
form, they were delivered conditionally on such accounting being
made from January, 1925, to May 15, 1931, the date of notes, so
that the notes payable was the plaintiff's own statement as an
agreement alleged by defendant to have been made with plaintiff,
which provided that defendant was not to pay any more than then
any other amount in the building.
Defendant testifies in his own behalf attempted and
offered to prove the purported conditional delivery of the notes
in question, and objection to his attempt and offer was sustained
by the trial court.
Thereafter, on rebuttal and without objection,
defendant was permitted to present to the jury substantially
all of the matters relied on by him as upon conditional execution
and delivery of the notes.
Giving the consideration to all evidence offered,
presented by way of hearsay, or otherwise appearing in the record
of the trial of this case, whether competent or incompetent, and
whether received with or without objection at all, we must
conclude that in the present state of this record we can find no
evidence which indicates or tends to indicate with what person
or persons, with or without authority, he was the plaintiff, or
under what condition or circumstances, or at what time or place,
any agreement binding in law was made for the conditional
execution and delivery of the notes in question.
This record is not in such shape that the rights of

the parties may be fairly and properly determined; therefore the judgment of nil capiat entered on the verdict of the jury is reversed and the cause remanded.

REVERSED AND REMANDED.

Scanlan, P. J., and Gridley, J., concur.

the finding may be fairly and properly substantiated.

The payment of any salary within the period of the

year is treated as the same payment.

REVENUES ARE REVENUES.

REVENUES ARE REVENUES.

36174

ABE ELLIS and HAROLD ELLIS,
DOING BUSINESS AS HAMLIN
PARKWAY GARAGE, for the use
of HENRY PERLMAN,
Appellants,

v.

LIBERTY TRUST & SAVINGS BANK,
a corporation, Garnishee,
Appellee.

APPEAL FROM MUNICIPAL
COURT OF CHICAGO.

270 I.A. 623²

MR. JUSTICE SULLIVAN DELIVERED THE OPINION OF THE COURT.

In a trial before the court without a jury, the plaintiffs, Abe Ellis and Harold Ellis, doing business as the Hamlin Parkway Garage, for the use of Henry Perlman, obtained a finding and judgment against the Liberty Trust & Savings Bank, a corporation, garnishee, for \$15.41. Plaintiffs' appeal followed.

December 31, 1931, Henry Perlman recovered a judgment by confession in the Municipal court against Abe Ellis and Harold Ellis, doing business as the Hamlin Parkway Garage for \$315. On the same day after an execution had been returned "no property found" a garnishment affidavit was filed and garnishee summons issued against the Liberty Trust & Savings Bank as garnishee. The writ was served on the garnishee December 31, 1931, and directed garnishee to answer as to rights, credits, choses in action, effects, estates, property or money in its hands belonging to Abe Ellis and Harold Ellis, doing business as the Hamlin Parkway Garage. There is some question raised as to when the answer of the bank was filed, but the record shows it to have been filed February 1, 1932. However, we are chiefly concerned with the period from December 31, 1931, /

THE STATE OF NEW YORK
COUNTY OF NEW YORK
IN SENATE
JANUARY 1, 1932

STATE OF NEW YORK
COUNTY OF NEW YORK

280 L.A. 623

LIBERTY TRUST & SAVINGS BANK
A CORPORATION, INCORPORATED
IN NEW YORK

MR. JUSTICE SULLIVAN DELIVERED THE OPINION OF THE COURT.

In a trial before the court at New York City, the
plaintiffs, the State of New York and the State of New York
Hamilton Parkway Garage, for the use of Henry Hamilton, obtained
a finding and judgment against the Liberty Trust & Savings
Bank, a corporation, organized, for the State of New York.
The following facts were found:

December 31, 1931, Henry Hamilton recovered a judgment
by consent in the Municipal Court against the State of New York
Hamilton Garage, being business as the Hamilton Parkway Garage for
\$100. On the same day after an execution had been returned
"no property found" a garnishment against the State of New York
garnished summons issued against the Liberty Trust & Savings
Bank as garnishee. The writ was served on the garnishee
December 31, 1931, and directed garnishee to answer as to
rights, credits, claims in action, debts, contracts, property
or money in its hands belonging to the State of New York and Hamilton Garage.
There is some
question raised as to when the answer of the bank was filed,
but the record shows it to have been filed February 1, 1932.

to January 11, 1932. The bank answered that at the time of the service of the writ and at all times since and up to and including the date of the answer, it was indebted to the principal defendant for \$15.41, which defendant had on deposit with garnishee bank in a checking account, and that it had no moneys, etc., owned by or due to the defendant, except the \$15.41 in its possession at the time of the service of writ or at any time since then up to the date it filed its answer.

It is undisputed that the garnishee bank did not have any money in its possession in any account in the name of Abe Ellis, Harold Ellis, Hamlin Parkway Garage, or Abe Ellis and Harold Ellis, doing business as Hamlin Parkway Garage, at the time of the service of the writ or at any time up to the filing of the answer.

It developed on the hearing that the bank did have a checking account in the name of H. H. Ellis and, inasmuch as no question was raised as to identification of the account after it was located, and the plaintiff contended that H. H. Ellis was in fact Harold Ellis, we must conclude that H. H. Ellis and Harold Ellis, the principal defendant, were one and the same person.

Briefs and arguments on both sides discussed at length the Municipal court rule, which provides for an indorsement on the copy of the writ left with garnishee of the business of the principal defendant, his business and residence address so far as known, as well as the date and amount of judgment and costs to date. A copy of the writ was not offered in evidence. The original writ, however, showed no such indorsement and the only evidence in the record as to the presence or absence of the required indorsement was the testimony of A. H. Miller, who was assistant trust officer of the bank, to the effect that that

to January 11, 1933. The bank announced that at the time of the service of the writ and of all times since and up to and including the date of the answer, it was indebted to the principal defendant for \$155.41, which defendant had on deposit with plaintiff bank in a checking account, and that it had no money, etc., owned by or due to the defendant, except the \$15.41 in the possession at the time of the service of writ or at any time since then up to the date it filed the answer.

It is undisputed that the plaintiff bank did not have any money in its possession in any account in the name of the Ellis, Harold Ellis, William Henry George, or the Ellis and Harold Ellis, being business as William Henry George, at the time of the service of the writ or at any time up to the filing of the answer.

It developed on the hearing that the bank did have a checking account in the name of H. H. Ellis and, inasmuch as no question was raised as to identification of the account after it was located, and the plaintiff contended that H. H. Ellis was in fact Harold Ellis, we must conclude that H. H. Ellis and Harold Ellis, the principal defendant, were one and the same person.

Plaintiff and defendant on both sides discussed at length the material facts, which provided for an instrument on the copy of the writ with exhibits of the business of the principal defendant, the business and residence address so far as known, as well as the date and amount of judgment and costs to be paid. A copy of the writ was not offered in evidence. The material facts, however, showed no real instrument and the only evidence in the record as to the business or absence of the principal defendant was the testimony of A. H. Miller, who was plaintiff's driver at the time of the trial, as the officer that said

information was not on the face of the summons received by the bank.

Mr. Miller, the only witness in the case, also testified that when the writ was served on the bank he read it and it named Abe Ellis and Harold Ellis as the principal defendants; that he went to the bank vault and searched for any possible account in the name of Abe Ellis, Harold Ellis or the Hamlin Parkway Garage; that he found no account in any of these names; that he went through the savings accounts and through the real estate loans with the same result; that December 31, 1931, he 'phoned the office of the attorney for the beneficial plaintiff and was told that he was out of town; that he called the same attorney several times later upon his return and told him that, if the bank had any such account and more information was furnished, he would be glad to run it down; that he could not find anything and was willing to give any assistance he could; that he persisted in asking the same attorney for further information to assist him in looking up possible accounts of the principal defendants; that finally on the 8th or 9th (presumably of January) the attorney gave him the address of Harold Ellis as 3932 Van Buren street; that finally (did not state when) he looked through the bank files and finally (did not state when) found that this fellow (presumably H. H. Ellis) lived on Van Buren street; that he got in touch (he did not state when) with the customer (presumably H. H. Ellis), prepared an answer and sent it to the bank's attorney for filing.

The evidence is confusing and indefinite as to just how much money was in the hands of the bank belonging to H. H. Ellis, later discovered to be one and the same person with Harold Ellis, principal defendant, from the time of the service of the writ until the answer was filed, but in any event it appears, not from the record but from the briefs and additional abstract,

information was not on the face of the summons received by the

bank.

Mr. Miller, the only witness in the case, also testified

that when the wife was served on the bank he told it and it removed

the alias and Harold Ellis as the principal defendants; that he went

to the bank vault and searched for any possible accounts in the name

of the alias, Harold Ellis or the Hamilton Parkway Garage; that he

found no account in any of these names; that he went through the

savings accounts and through the real estate loans with the same

result; that December 21, 1931, he 'phoned the office of the attorney

for the beneficial plaintiff and was told that he was out of town;

that he called the same attorney several times later upon his return

and told him that, if the bank had any such accounts and more infor-

mation was furnished, he would go back to him as soon as he could

and that nothing was being done to give any satisfaction in the case;

that he persisted in asking the same attorney for further information

to assist him in looking up possible accounts of the principal

defendants; that finally on the 21st or 22nd (presumably of January)

the attorney gave him the names of Harold Ellis as well as others

about that time; (did not state when) he looked through the

bank files and finally (did not state when) found that this fellow

(presumably H. H. Ellis) lived on the Brown Street; that he got in

touch (he did not state when) with the witnesses (presumably H. H.

Ellis) through an answer and that it is the bank's attorney that

Ellis.

The evidence is conflicting and indefinite as to just how

much money was in the hands of the bank belonging to H. H. Ellis.

Later discovered to be one and the same person with Harold Ellis.

Principal defendant, from the time of the service of the writ

until the answer was filed, had in any event no response, and

from the record and from the bills and additional questions.

that there was more than sufficient to pay the beneficial plaintiff the full amount of his judgment if the judgment debtor had not been permitted to reduce the amount on deposit.

It did not appear in evidence, but the briefs of plaintiff and garnishee, as well as the additional abstract, disclose that January 11, 1932, the garnishee bank permitted the judgment debtor to withdraw from his account by check \$1278.33, leaving in his checking account with the bank a balance of \$18.41.

The plaintiff first contends that the garnishee was negligent and acted in disregard of the rights of the plaintiff in failing to locate and discover the account of H. H. Ellis as the money and property of Harold Ellis, the judgment debtor.

In passing on a case where a judgment debtor's name was Joe Handman and garnishee bank permitted payment to a creditor whose name was Joe Handman, this court held in Handman v. The West Side Trust & Savings Bank, 249 Ill. App. 372, 379:

"After a careful consideration of many of the authorities bearing on the subject, we have reached the conclusion that the following is a correct statement of the law applicable to the present contention: A writ or summons in garnishment must contain an accurate description as to the name of the principal defendant or person to whom the garnishee is indebted but 'the garnishee becomes liable to hold the property subject to the process where he has actual knowledge of the identity of the principal defendant though the latter's name is not correctly given or has reason to suppose the proceedings are intended to be against his creditor.' (28 C. J. 220, 221.)"

And in the same opinion the court continuing on page 381 held:

"In the instant case it is not disputed that the writ did not designate with accuracy and clearness the person to whom the garnishee was indebted, and the plaintiff had the burden of proving that the garnishee had actual knowledge of the identity of the principal defendant, or had reason to suppose that the garnishee proceedings were intended to be against its creditor. In our judgment, plaintiff had failed in this regard. The burden was upon the beneficial plaintiff to show that the garnishee acted in bad faith (Wilhelmi v. Haffner, 52 Ill. 222; Hennessey Bros. Co. v. St. Mary's Academy, 171 Ill. App. 470, 472), and there is not a scintilla of evidence in the case tending to show that the defendant bank so acted, nor is there any proof that the garnishee had actual knowledge of the identity of the principal defendant, nor are there sufficient facts and circumstances to warrant a finding that the defendant bank had reason to suppose that the garnishee proceedings were intended to be against Joe Handman."

that there was some difficulty in getting the defendant's
with the full amount of his judgment if the judgment debtor had
not been permitted to receive the amount on deposit.

It did not appear in evidence, but the facts of plain-
tiff and defendant, as well as the additional amount, disclosed

that January 11, 1937, the defendant had paid the judgment
debtor an amount from his account by check \$125.00, leaving in

his checking account with the bank a balance of \$18.40.

The plaintiff first contends that the defendant was

obliged to stop in default of the writ of the plaintiff

in failing to make and deliver the amount of \$18.40.

as the money and property of Harold Miller, the judgment debtor.

It is argued on a case where a judgment debtor's name

was for judgment and defendant had received payment in a check

where there was no judgment. This court held in Miller v. The

First State Bank & Savings Bank, 200 Ill. App. 2d 579.

"After a careful consideration of many of the authorities
bearing on the subject, we have reached the conclusion that the
following is a correct statement of the law applicable to the present
controversy: A writ of execution in garnishment must contain an
accurate description as to the name of the judgment debtor or
person to whom the judgment is assigned but the garnishee is not
liable to pay the property subject to the process where he has
actual knowledge of the identity of the judgment debtor. In such
the latter's name is not necessarily given or has reason to believe
the proceedings are intended to be against him creditor." (200 Ill. App. 2d 579, 581.)

and in the same opinion the court continues on page 581 that

"In the instant case it is not disputed that the writ
did not describe with accuracy and certainty the person to whom
the garnishee was indebted, and the plaintiff has the burden of
proving that the garnishee had actual knowledge of the identity
of the judgment debtor, or had reason to suppose that the
garnishee proceedings were intended to be against the creditor.
In our judgment, plaintiff has failed in this regard. The burden
was upon the plaintiff to show that the garnishee noted
on his books (Exhibit A, 200 Ill. App. 2d 582) was not a
Y. S. Bank & Savings Bank, Inc. (Ex. A, 200 Ill. App. 2d 582) and that it was
entitled to notice in the same manner as was given the defendant
bank in order that it might give notice that the garnishee had actual
knowledge of the identity of the judgment debtor, and that there
was sufficient cause and circumstances to warrant a finding that the
defendant bank had reason to suppose that the garnishee proceedings
were intended to be against the bank."

So in this case where the person to whom the garnishee was indebted was not designated with accuracy and clearness, where the judgment debtor's name was Harold Ellis, and the garnishee bank's creditor was H. H. Ellis, the plaintiff had the burden of proving that the garnishee had actual knowledge of the identity of the principal defendant or had reason to suppose that the garnishee proceedings were intended to be against its creditor, H. H. Ellis. The burden was on the plaintiff to show that the garnishee acted in bad faith. This the plaintiff failed to do. There is no evidence in the case tending to show that the bank so acted. The evidence in the record is to the effect that the garnishee bank, unable to find accounts of the principal defendants, as named in the writ, used all reasonable diligence in endeavoring to locate the account the plaintiff sought to reach.

The plaintiff further contends that regardless of the merits of its first contention the judgment of the municipal court should be reversed and judgment entered here for \$315, the full amount of its original judgment, on the grounds that even though garnishee could not and did not locate the account in question upon the service of the writ or for several days thereafter, it did finally locate and discover an account of the principal defendant, Harold Ellis, under the name and style of H. H. Ellis, and that at the time of such discovery there was more than sufficient money in the account to cover the original judgment. The plaintiff is correct in this contention if it was shown by the evidence that at the time of the discovery of the account there were funds in the hands of the garnishee belonging to the judgment creditor.

To support this contention we have to look to the evidence of Mr. Miller solely. We have scrutinized his

[illegible]

testimony closely, and it discloses that this account was located finally but does not indicate with that definiteness and certainty that the law requires when the discovery was made or if it was made before or after the garnishee permitted the principal defendant to withdraw his money from the checking account. The witness was not properly interrogated, questions that were pertinent and material were not asked and the witness was not required to make such answers as would clarify the issues. It is our opinion that on this record the issues cannot be fairly and properly decided, and the case should be retried.

For the reasons stated the judgment of the Municipal court is reversed and the cause remanded.

REVERSED AND REMANDED.

Scanlan, P. J., and Gridley, J., concur.

[illegible]

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36216

FRANK SCHOFIELD,
Appellee,

v.

COSMOPOLITAN LIFE INSURANCE
CO., a corporation,
Appellant.

APPEAL FROM MUNICIPAL
COURT OF CHICAGO.

270 I.A. 623³

MR. JUSTICE SULLIVAN DELIVERED THE OPINION OF THE COURT.

In a trial before the court without a jury the plaintiff obtained a finding and judgment June 1, 1932, against the Cosmopolitan Life Insurance Company (hereinafter called the Consolidated Company), for \$791.16. This appeal followed.

Therefore on November 25, 1931, the plaintiff, who is an attorney at law, had obtained a judgment by confession for \$771.35 against the Sheridan Life Insurance Company (hereinafter called the Sheridan Co. or constituent company), on its note dated May 20, 1931, payable November 20, 1931, with interest at 6%. The note was executed by the Sheridan Co., a corporation, by Harrison Parker, president, and F. J. Lifka, secretary, and the plaintiff claims that it was given to him as security for \$700, due and owing him for services rendered to the Sheridan Co. about a year previous to the execution of the note. This judgment included attorney's fees and interest.

May 18, 1931, the stockholders of the Sheridan Co. and the Consolidated Company passed resolutions adopting a consolidation and reinsurance contract, which by its terms was to be effective when approved by the director of Trade and Commerce of Illinois as provided by par. 31, ch. 73, Cahill's Ill. Rev. St., and which provided, among other things, that the business of the consolidated companies was to be carried on by

LAST CHARTER
appealed

APPEAL FROM JUDGMENT

COURT OF COMMONS

THE NATIONAL LIFE INSURANCE
CO., a corporation,
Appellant.

280 L.A. 623

MR. JUSTICE COLLIER delivered the opinion of the court.

In a trial before the court without a jury the plain-
tiff obtained a finding and judgment June 1, 1932, against the
Commonwealth Life Insurance Company (hereinafter called the
Consolidated Company), for \$752.16. This appeal followed.
Thereafter on November 23, 1931, the plaintiff, who
is an attorney at law, had obtained a judgment by confession
for \$751.16 against the American Life Insurance Company (herein-
after called the American Co. or constituent company), on the
note dated May 20, 1931, payable November 23, 1931, with interest
at 6%. The note was executed by the American Co., a corporation,
by Harrison Parker, president, and W. J. Liska, secretary, and
the plaintiff claims that it was given to him as security for
\$700, due and owing him for services rendered to the American
Co. about a year previous to the execution of the note. This
judgment included attorney's fees and interest.
May 13, 1931, the stockholders of the American Co.
and the Consolidated Company passed resolutions whereby a
consolidation and reinsurance contract, which by its terms was
to be effective when approved by the director of Trade and
Commerce of Illinois as provided by Gov. 31, Ch. 75, Cahill's
Ill. Rev. St., and which provided, among other things, that the
business of the consolidated company was to be carried on by

and under the name of the Cosmopolitan Life Insurance Company. The contract of consolidation and reinsurance was approved by the director of Trade and Commerce July 28, 1931.

The plaintiff predicated his claim in the instant case upon an open account for services rendered to the Sheridan Co. prior to May 18, 1931, the date when the stockholders of both corporations by resolution agreed to consolidate; the promissory note of May 20, 1931, and the judgment debt confessed against the constituent corporation under the warrant of attorney contained in the note.

The defendant contends that the officers of the constituent company had no authority on May 20, 1931, to execute either the promissory note sued on or the warrant of attorney authorizing the entry of a judgment by confession on same. This contention was apparently very lightly regarded by the defendant and abandoned by it as no argument was advanced in its brief in support of same. The courts of this and other states are almost unanimous in holding that a judgment note signed in the name of a corporation by its president and secretary will bind the corporation in the absence of any showing that they had no authority as such officers to sign the note. No such showing was made here and the evidence is conclusive that the services were rendered for which the note was given.

The contentions relied on by the defendant for a reversal of this judgment are, first, that the consolidation was effective May 18, 1931, when a resolution was passed by both corporations adopting the consolidation agreement, and that the note having been executed and delivered May 20, 1931, after the consolidation had taken place could not be enforced as an obligation of the Sheridan Co. existing at the time of the consolidation; second, that if it is held that the consolidation was not effective until

and under the name of the Commercial Life Insurance Company.
The contract of consolidation and reinsurance was approved by
the Director of Trade and Commerce July 28, 1931.

The plaintiff presented his claim in the instant case

upon an open account for services rendered to the American Co.

prior to May 12, 1931, the date when the stockholders of both

corporations by resolution agreed to consolidate the preliminary

note of May 12, 1931, and the judgment was rendered during

the consolidation conference under the name of either corporation

in the note.

The defendant contends that the officers of the consolidation

company had no authority on May 28, 1931, to execute either the

preliminary note made on or the warrant of attorney authorizing the

entry of a judgment by confession on same. This contention was

apparently very lightly regarded by the defendant and abandoned by

it as no argument was advanced in its brief in support of same.

The court of this and other states are strongly unanimous in hold-

ing that a judgment note signed in the name of a corporation by

its president and secretary will bind the corporation in the

absence of any showing that they had no authority as such officers

to sign the note. No such showing was made here and the evidence

is conclusive that the services were rendered for which the note

was given.

The contention relied on by the defendant for a reversal

of this judgment was, first, that the consolidation was effected

May 12, 1931, when a resolution was passed by both corporations

authorizing the consolidated agreement, and that the note having

been executed and delivered May 28, 1931, after the consolidation

had taken place could not be enforced as an obligation of the

consolidation as existing at the time of the consolidation.

That it is held that the consolidation was not effective until

July 21, 1931, when it was approved by the director of Trade and Commerce, the defendant still was not liable to plaintiff because under its consolidation agreement with the Sheridan Co. the liabilities to be assumed by it were specified and this claim was not one of them; third, that if it were held that all the liabilities and obligations of the Sheridan Co., existing at the time of the consolidation, were in law the defendant's liabilities after the consolidation, the plaintiff must bring his suit directly against the Consolidated Company, and the law will not permit him when no action is pending against the constituent company at the time of the consolidation to recover judgment against the constituent company and then bring an action against the defendant based on the former judgment; fourth, that, having recovered the judgment after the consolidation against the constituent company, the plaintiff's claim and cause of action against the Sheridan Co. were merged in the judgment which was recovered against that company November 23, 1931, and that the claim based on that judgment is a new claim and not the claim existing at the time of the consolidation, and therefore being a claim arising after consolidation is not enforceable against the consolidated companies.

In disposing of the first contention it is only necessary to call attention to section 8 of the contract of consolidation, which is as follows: "This contract to be subject to approval of Director of Trade and Commerce of Illinois, and to be in force upon such approval."

If the contract itself was not conclusive as showing that the consolidation went into effect July 28, 1931, rather than May 18, 1931, par. 31, ch. 73, Cahill's Ill. Rev. St., under which the consolidation took place, which provides as follows, is decisive:

July 11, 1931, when it was approved by the directors of Trade and Commerce, the defendant still was not liable to Plaintiff because under the consolidation agreement with the defendant no. 100 liability is not assumed up to time specified and this date was not one of those dates, and it is not until that all the liabilities and obligations of the defendant are, existing at the time of the consolidation, were in law the defendant's liabilities after the consolidation, and Plaintiff must bring his suit directly against the consolidated company, and the law will not permit him when no action is pending against the defendant company at the time of the consolidation to recover judgment against the consolidated company and then bring an action against the defendant based on the former judgment; fourth, that, having recovered the judgment after the consolidation against the consolidated company, the Plaintiff's claim was based at least against the defendant as was based in the judgment after was recovered against that company November 23, 1931, and that the claim based on that judgment is a new claim and not the claim existing at the time of the consolidation, and therefore being a claim arising after consolidation in law and therefore against the consolidated company.

In disposing of the first contention it is only necessary to call attention to section 2 of the contract of consolidation, which is as follows: "This contract to be subject to approval at meeting of Trade and Commerce of Illinois, and to be in force from that date."

If the contract itself was not conclusive in showing that the consolidation was into effect July 11, 1931, which claim was filed July 11, 1931, how can it be that the consolidation was not in effect at that time?

Every judicial body of record, which provides as follows, is decisive:

"Upon adoption of the articles of consolidation or contract of reinsurance, as provided for herein, said proposed articles of consolidation or contract of reinsurance shall be duly executed by the president and attested by the secretary, or the executive officers corresponding thereto, under the corporate seal of each of the consolidating or contracting companies, and thereupon a certified copy of such articles of consolidation or contract of reinsurance, together with a certificate of its adoption, as provided for herein, verified by the affidavits of such officers and under the seal of each of said companies, shall be submitted to the Director of Trade and Commerce for his approval. * * * No articles of consolidation or contract of reinsurance shall take effect unless and until the provisions of this Act have been complied with and the approval of the Director of Trade and Commerce has been obtained as herein provided."

Defendant's contention that the note was given after the consolidation is not sound.

There is ^{no} merit in defendant's second contention that its liability on obligations of the Sheridan Co. existing at the time of the consolidation was limited by the terms of the consolidation contract and that it assumed no liability as to plaintiff's claim. The law is well settled that consolidating corporations may make agreements or contracts restricting or limiting liabilities and claims existing at the time of the consolidation that may be binding as to themselves, but said contracts can have no binding force as to third persons, and that if the liability of the consolidated company is not fixed by the contract of consolidation or by statute for the claims and obligations of the constituent companies existing at the time of the consolidation it is imposed by operation of law.

The rights of creditors of consolidating companies are protected in this state under par. 71 of the General Corporation Act, which is applicable to consolidations under the Insurance Act and which provides:

"All rights of creditors and all liens upon the property of either of such merging or consolidating corporations shall be preserved unimpaired, and all debts, liabilities and duties of the respective corporations shall henceforth attach to such single corporation and may be enforced against it to the same extent as if such debts, liabilities and duties had been incurred or contracted by it. * * *

Defendant's third contention is that plaintiff is precluded from maintaining this action because suit was not brought directly against the defendant consolidated company after consolidation. It is insisted in support of this contention that after the consolidation the only causes of action that can be maintained against the constituent company are causes that were actually pending at the time of the consolidation and that other existing claims against the constituent company can only be enforced by action directly against the resulting corporation and in support of this contention the defendant relies on par. 39 of the Insurance Act, which provides:

"No action or proceeding pending at the time of the consolidation or reinsurance, to which either of the consolidating companies or the contracting companies may be a party, shall be abated or discontinued by reason of such consolidation or reinsurance, but the same may be prosecuted to final judgment in the same manner as if the consolidation or reinsurance had not taken place, or the consolidated or reinsuring company, if the reinsurance agreement so provides may be substituted in place of any such company so consolidated or reinsured, as the case may be, by order of the court in which the action or proceeding may be pending."

This statute does provide the procedure as to pending suits, but it is silent as to the manner in which existing claims that are not in suit shall be prosecuted. It is urged that it was necessary for the purpose of orderly procedure in the courts that the status of pending suits against constituent companies be not disturbed and that the same necessity did not exist as to claims upon which no action had been commenced and that it could be reasonably inferred that it was the intention of the legislature that actions based on such claims must be brought directly against the consolidated company which was alive and going and in a position to defend against such claims.

No case has been cited in this state and we have been unable to find one that holds that the plaintiff is precluded from recovering under the facts presented here unless the action is

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which directly affected the defendant's conduct and the defendant's conduct was the cause of the defendant's death.

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actually pending at the time of the congressional hearing.

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See also: [List of documents](#)

THE OFFICE OF THE ATTORNEY GENERAL

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any order of the court in which the action is proceeding may be
used in support of a motion for judgment or dismissal, as the case may be,
and no agreement is provided as to how the same may be
admitted in evidence in any
action brought by the complainant or defendant, if the defendant
is not a party to the action, as in the case of a
counterclaim, and the same may be proposed as evidence in the
action by the defendant by reason of such admission as being
admitted or the contents of the same may be a party, shall be
admitted as evidence, as in the case of the defendant.

This subject does involve the procedure as to handling

which, but it is difficult to see how we can avoid this.

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and extensive soundings further along within the next few days.

of no value for his witnesses even if they had been admitted to

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the unavailability of any other information.

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we will be able to see the great difference between the two

brought directly against the consolidated company.

Both plaintiff and defendant cite and rely upon Chicago, S. P. & C. Ry. Co. v. Ashling, 160 Ill. 373, and Franklin Life Insurance Co. v. Adams, 90 Ill. App. 653. The Ashling case, after holding that the consolidated company assumed all the liabilities and obligations of the constituent company, held that an action could be prosecuted to judgment against the constituent company and in turn against the consolidated company. This, however, was a case in which the action was pending at the time of the consolidation. In the Adams case a policy holder of the constituent company died after the consolidation and an action was brought against the constituent company to recover on the policy. The court held that the cause of action arose after the consolidation and therefore the only proper defendant was the consolidated company. In Langhorne v. Richmond etc. Ry. Co., 91 Vt. 69 (22 S. E. 159, 161), the plaintiff made the constituent company and the consolidated company joint defendants in an action arising out of a claim against the constituent company which existed at the time of the consolidation. In holding that they could not be sued jointly the court said:

"They are not jointly liable. One is liable for committing the alleged injury; the other is liable by reason of the consolidation proceedings. The plaintiff has the right to sue either for the injury alleged to have been done, but has no right to sue both in the same action at law."

None of these cases presents the precise question involved in this case where the plaintiff in an action brought after consolidation recovers a judgment against the constituent company on a claim existing at the time of the consolidation and in turn brings an action against the consolidated company based on the previous judgment alleging facts showing the consolidation.

The plaintiff maintains that his claim against the constituent company was secured by a judgment note and that he

amount already against the consolidated company.

Both liability and defense are now before

the court. City of New York v. Consolidated Gas Co.

191 N.Y. 211, 188 N.E. 211, 100 Ill. 211, 188 N.E. 211.

holding over, after holding that the consolidated company

assumed all the liabilities and obligations of the consolidated

company, held that an action could be prosecuted to judgment

against the consolidated company and its surety against the consolidated

company. This, however, was a case in which the action was pending

at the time of the consolidation. In this case a policy holder

of the consolidated company died after the consolidation and an action

was brought against the consolidated company to recover on the policy.

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and therefore the only proper defendant was the consolidated company.

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the court said:

"They are not jointly liable; one is liable for
consolidation the other is liable for the claim by reason
of the consolidation provisions. The plaintiff has the right
to sue either for the injury alleged to have been done, but has
no right to sue both in the same action at law."

Some of these cases present the question whether

in this case where the plaintiff is an action brought after con-

solidation between a judgment against the consolidated company

on a claim existing at the time of the consolidation and to sue

before an action against the consolidated company based on the

question judgment affecting their existing consolidation.

The plaintiff maintained its claim against the

consolidated company and against the consolidated company and the

was justified under the law in enforcing his claim in the manner and form in which it existed at the time of the consolidation and without any impairment of his rights regardless of the consolidation. It is clear that the law would not permit the plaintiff to obtain a judgment by confession against the consolidated company on a judgment note which was executed by the constituent corporation since the consolidated company did not execute the warrant of attorney and a warrant of attorney to confess must be strictly pursued. If the plaintiff was compelled to bring his action directly against the consolidated company he would have had to waive his judgment by confession without process, which would have been a serious impairment of his rights existing at the time of the consolidation.

There is no contention that this was not a meritorious claim and under the facts presented we feel that the plaintiff was within his rights in obtaining the judgment by confession against the constituent company and bringing his action against the consolidated company based on that judgment.

In construing the law applicable to a consolidation effective under the New York statute, which is similar to ours, the New York court of Appeals said in Utica Nat. Brewing Co., 154 N. Y. 268, 273:

"Nor did the recovering of the judgments upon the notes affect the creditor's rights against the new company. Their effect was, simply, to effect a change in the form of its liability to its creditor. It was open to the creditor, under the provisions of the statute, pursuant to which the consolidation of the companies was effected. (Chap. 691, Laws of 1892), to enforce the liability, either against the corporation whose debt it was, or against the new corporation whose debt it became under the statute, which made it liable to pay and discharge all of the liabilities of each of the corporations consolidated. (Sec. 12.) The very purpose of this statute, while permitting companies to consolidate themselves into a single corporation, was to preserve to the creditor all his rights, unimpaired by what was done, and its operation is to furnish to him remedies, necessarily, concurrent in their nature. The creditor's pursuit of a remedy against his original debtor presents no legal obstacle to his effect to collect his debt from the new company."

To avoid circuitry of action no doubt the proper practice

as a general rule is to proceed directly against the resulting corporation on a claim against a constituent company existing at the time of the consolidation but that rule can have no application here where the claim is secured by a judgment note executed by the constituent company, which could not by its terms be confessed against the consolidated company. In 7 R. C. L., par. 159, p. 187, the law is said to be:

"Hence, if by authority of law and the act of the parties, the consolidated corporations are molded into one with none of their rights impaired, and none of their responsibilities lessened, there is no good reason why the same proceedings may not be had against the new corporation as might have been had against the old to compel payment of liabilities. This avoids circuitry of action and allows the party with whom the contract was made, or to whom the injury was done, to proceed directly against the corporation which, by virtue of the consolidation proceedings, is made liable for it. And the fact that the constituent corporations are to be deemed as still in existence for the purpose of protecting the rights of creditors does not, where the consolidated company assumes or has imposed upon it the liabilities of its constituents, prevent suit being brought by a creditor of the old against the new corporation. In such a case the effect of the statute is to permit the prosecution of the claim against either the new or the old corporation. Nor does the recovery of judgment against the constituent corporation affect the statutory liability of the consolidated company for the debt. Its effect is simply a change in the form of its liability to its creditors."

We are of the opinion that under the facts presented the plaintiff proceeded properly against the old corporation and in turn against the consolidated company for in no other way could he have preserved all his rights and established his claim unimpaired and in no wise "changed or modified."

The defendant's fourth contention that in the judgment against the old company was merged whatever claim the plaintiff had against the Sheridan Co., and inasmuch as the judgment against the Sheridan Co. was entered after the consolidation it presented a new claim for which the consolidated company could not be held liable, is untenable.

This contention is completely answered and refuted by the holding of our Supreme court, which is equally applicable here, in Chicago N. E. & C. Ry. Co. v. Ashling, supra, in which it is said:

as a general rule in its proceedings directly against the resulting corporation as a claim against a consolidated company existing at the time of the consolidation but that rule can have no application here where the claim is asserted by a defendant merged by the consolidated company, which would not by its terms be concerned against the consolidated company. In *V. O. B.*, 100, 101, p. 107, the law is said to be:

"Hence, if by absorption of one and the rest of the parties the consolidated corporations are united into one with none of their rights impaired, and none of their responsibilities increased, there is no good reason why the same proceedings may not be had against the new corporation as might have been had against the old so long as payment of liabilities. This avoids directly at action and assigns the party with whom the contract was made, or to whom the duty was owed, to proceed directly against the corporation which, by virtue of the consolidation proceedings, is made liable for it. And this fact that the consolidated corporation is to be deemed as still in existence for the purpose of preserving the rights of creditors does not, where the consolidated company assumes or has imposed upon it the liabilities of the consolidated, prevent suit being brought by a creditor of the old against the new corporation. In such a case the effect of the statute is to permit the prosecution of the claim against either the new or the old corporation. For does the recovery of judgment against the consolidated corporation affect the liability of the consolidated company for the debt. The effect is simply a change in the form of the liability to the creditors."

We are of the opinion that under the facts presented the plaintiff presented properly against the old corporation and is now against the consolidated company for in no other way could he have preserved all his rights and established his claim unimpaired and in no wise "changed or qualified."

The defendant's fourth contention that in the judgment against the old company was merged the debt claim the plaintiff had against the Northern Co., and inasmuch as the judgment remains the Northern Co. was entered after the consolidation it presented a new claim for which the consolidated company could not be held liable, is untenable.

This contention is completely answered and refuted by the holding of our Supreme court, which is equally applicable here, in *Chicago & N. W. Ry. v. V. O. B.*, supra, in which it is said:

"It is next insisted by plaintiff in error, that as the judgment sued on in this case was rendered after the consolidation it cannot be held to be a liability of the St. Louis company existing at or accrued prior to such consolidation, within the meaning of the statute creating the liability. Counsel refer to the well known rule that the original liability of cause of action is merged in the judgment, and say that in this case the judgment must be regarded as a new debt or liability which accrued when the judgment was rendered, that is, after the consolidation took place, - and that the statute creating the liability does not make the consolidated company liable for causes of action accruing against its constituent members after the consolidation. The case of *Dayton v. Ball*, 106 Ill. 627, and other cases, are cited by counsel as practically decisive of the question. The point decided by these cases relevant to this discussion amounts to but little more than a re-statement of the general rule above mentioned, that the judgment is a new debt or liability into which the original cause of action has been merged. There would be much force in the contention of counsel from a technical point of view in determining the question raised in the case at bar, were it not for the other statutory provisions which it is equally the duty of the courts to enforce. By section 7 of the act of 1872, above set out, the consolidation "shall not affect suits pending," nor causes of action, nor the rights of persons, in any particular," and suits previously brought shall not be abated; and by the act of 1885 nothing in it shall "be so construed as to in any manner relieve or discharge any railroad company * * * from the duties or obligations imposed by virtue of any statute" in force. These provisions of the statute would be nullified if the rule contended for should be applied in such a case as this."

The same doctrine was enunciated in *7 Thompson on*

Corporations, sec. 8242, in which it is stated:

"But it is believed that most of the statutes which authorize consolidations expressly provide that all rights of action existing against the constituent companies at the time of the consolidation shall survive against the new corporation thereby formed. Where the statute contains this saving clause, and a person recovers a judgment at law against a corporation whose assets, franchise, stock, etc., have been acquired by another corporation, by a purchase and an issuing of its own shares in payment, the judgment creditor may maintain an action of debt upon his judgment against the purchasing corporation, - the transaction being a consolidation, and not a mere sale and purchase of assets. The statutory right of a creditor of one of the constituent corporations, or of a person damaged by a tort of one of them, to enforce his demand against the consolidated corporation, is not impaired by the fact that he has recovered a judgment for his demand against the constituent corporation, on any theory of merger or otherwise."

Finding no error in the judgment of the trial court it must be affirmed.

AFFIRMED.

Scanlan, P. J., and Gridley, J., concur.

36543

MYRTLE M. BELAND,
Appellee,

vs.

MODERN WOODMEN OF AMERICA,
a Corporation,
Appellant.

66 X
APPEAL FROM MUNICIPAL COURT
OF CHICAGO.

270 I.A. 623⁴

MR. PRESIDING JUSTICE McSURNELY
DELIVERED THE OPINION OF THE COURT.

Defendant appeals from a judgment of \$500 entered upon the verdict of a jury. Plaintiff's claim was on an insurance policy, or benefit certificate, issued by defendant upon the life of her husband, Joseph A. Beland, in which she was the beneficiary. The defense was (1) that it was necessary to prove that Mr. Beland was in good health when the certificate was issued, and (2) that the representations as to the state of his health made in the application for insurance were false.

Mr. Beland had been a member of the defendant organization since 1908, with insurance for \$2000; he retired from employment in 1930 and in September, 1931, reduced the amount of insurance he was carrying to \$500; in December application was made for an additional \$500 of insurance and the agent of defendant made out the application, but because it contained a mistake it was returned to the agent, who made out a whole new form of application on February 5, 1932. The benefit certificate in controversy was issued February 16th; Beland died February 28th.

It was sufficiently proven that Beland was in good health at the date the policy was issued. He was 57 years old at the time of his death. Witnesses who had known him for many years said he was in apparent good health. The agent for defendant who had known him since 1905 testified that on the day he delivered the benefit certificate Beland had on his working clothes, was preparing a room and was in apparent good health. There was evidence that he was

active - wheeling coal into his basement, repairing an automobile and a truck wheel, using a heavy sledge hammer. On February 15th he assisted a driver to start his automobile by pushing it a quarter of a block; it was described as "quite a hard push."

February 16th Beland apparently caught cold while working on an automobile, and a Dr. Englemann was called and treated him. At noon on the 28th of February while he was in the bathroom, dressed, he fell to the floor and soon died.

In the death certificate of Dr. Englemann the cause of death is given as "auricular fibrillation," and the remote cause of death as "bronchiectasis." A Doctor testifying as an expert on behalf of defendant said that "bronchiectasis" is an aggravated condition of bronchitis, and that "auricular fibrillation" is a fluttering of a valve of the heart; he gave it as his opinion that these diseases could not commence after February 5th (the date of the application) and cause death by February 28th; that it might take "bronchiectasis" as much as five years to cause "auricular fibrillation."

The jury could properly conclude that Beland was in apparently good health and vigor at the time the benefit certificate was issued. It is a matter of common knowledge that persons suffer from obscure irregularities of the heart without being aware of their condition, and which even a careful examination by a physician fails to disclose. As between the opinion evidence as to how far in the past Beland had suffered from any bronchial or heart trouble, and the objective evidence as to his physical condition and activities, the jury was justified in accepting the evidence of those who had known him long and seen him daily.

Defendant asserts that Beland made false answers in his application to questions touching his health. The falsity of his answers was not proven. One of the questions was whether he had

active - wheeling back into his house, retaining an automobile and a broken wheel, raising a heavy electric hammer. On February 19th he retained a driver to start his automobile by pushing it a quarter of a block; it was described as "quite a hard push."

February 19th indeed apparently brought with it a working on an automobile, and a Mr. Engstrom was called and treated him, as soon as the fact of February while he was in the bathroom, dressed, he fell to the floor and soon died.

In the death certificate of Dr. Engstrom the cause of death is given as "myocardial infarction," and the remote cause of death as "hypertension." A further finding is an absence of blood at the heart and "hypertension" is an exaggerated condition of hypertension, and that "myocardial infarction" is a condition of a type of the heart; he gave it as his opinion that these findings could not be made after February 19th, and that the condition and cause could be February 19th, and it might be "hypertension," as well as the fact that it was "hypertension."

The jury could properly conclude that the fact was in the person's good health and vigor at the time the death certificate was issued. It is a matter of common knowledge that persons suffer from obscure hypertension of the heart without being aware of their condition, and when even a careful examination by a physician fails to disclose. As between the opinion evidence as to how far in the past the fact had withered from any knowledge or knowledge, and the objective evidence as to his physical condition and activities, the jury was justified in accepting the evidence of those who had known him long and knew his habits.

Defendant asserts that the fact was known in his life - relation to condition preceding his death. The theory of his death was not proven. One of the questions was whether he had

"ever had, or has any physician treated you for or informed you that you ever had" - and then follows a long list of diseases of almost every variety, including delirium tremens, yellow fever and smallpox. Such a question was unreasonable, and the presumption is that the negative answer must be true. There was no proof that it was false.

Complaint is made of the instructions given by the court to the jury. The court instructed the jury orally and the record shows only a general exception. Under Rule 2 of the Municipal court the objections must be specific.

We do not deem it necessary to comment upon all the points discussed in the briefs. We would not be justified in setting aside the verdict, and the judgment is therefore affirmed.

AFFIRMED.

Matchett and O'Connor, JJ., concur.

"every man, or man any physician treating you for an internal you
that you ever had" - and then follows a list of diseases of
almost every variety, including diphtheria, typhoid fever,
and scurvy, and a question was put to the witness,
that is that the negative answer must be given. There was no doubt
that is the fact.

Question is made at the conclusion given by the witness
in the fact. The witness indicated the fact clearly and the witness
gave only a general answer. What date is it now indicated
about the relations must be established.

It is not clear if necessary to proceed with the
points discussed in the report. It would not be indicated in
evidence about the witness, and the witness is not a witness.
Witness.

Witness for defense, H. J. ...

36553

LOUIS WELSH,
Appellant,

vs.

JOHN GRIFFITHS AND SON
COMPANY, a Corporation,
Appellee.

67 A
APPEAL FROM SUPERIOR COURT
OF COOK COUNTY.

270 I.A. 624'

MR. PRESIDING JUSTICE McSURELY
DELIVERED THE OPINION OF THE COURT.

Plaintiff brought suit to recover compensation for personal injuries. Upon trial the court instructed the jury to find for defendant, and plaintiff appeals from the adverse judgment entered on the verdict.

Plaintiff's brief in this court is written in complete disregard of Appellate Court Rule 19, and out of the six cases cited four were incorrectly cited and one improperly entitled. However, as only a single question is involved we shall consider the case on its merits.

The gist of plaintiff's claim is that a certain fence defendant had constructed in connection with the erection of the new post office building in Chicago was so improperly constructed that it fell over onto plaintiff, injuring him. The defense is that the construction of the fence did nothing more than create a condition by which an injury was made possible by subsequent unforeseen independent acts of third persons.

About September 1, 1931, defendant was preparing to erect a new post office building in Chicago on a site bounded by Harrison, VanBuren and Canal streets; in order to enclose the work about to be undertaken, defendant erected fences across the Harrison street end of the lot and on the center of the Canal street pavement; plaintiff's witnesses described a portion of the Canal street fence as a temporary fence; this was constructed of 2 x 4 timbers with stringers on the top and bottom; 2 x 4 timbers were placed crosswise on the

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Plaintiff's motion for summary judgment is denied. The Court finds that the evidence is such that a trial is required. The Court finds that the evidence is such that a trial is required. The Court finds that the evidence is such that a trial is required.

Plaintiff's motion for summary judgment is denied. The Court finds that the evidence is such that a trial is required. The Court finds that the evidence is such that a trial is required. The Court finds that the evidence is such that a trial is required.

The issue of Plaintiff's claim is that a certain sum of money was paid to Defendant. The Court finds that the evidence is such that a trial is required. The Court finds that the evidence is such that a trial is required. The Court finds that the evidence is such that a trial is required.

About September 1, 1934, Defendant was speaking to one of Plaintiff's witnesses. The Court finds that the evidence is such that a trial is required. The Court finds that the evidence is such that a trial is required. The Court finds that the evidence is such that a trial is required.

lower stringers about every six or eight feet and stuck out about two feet on either side of the lower stringer; 1 x 6 inch boards were nailed onto the stringers; the whole fence was about six or seven feet high; the cross-pieces upon which it rested were anchored by means of large lumps of rock and concrete.

Plaintiff first appeared on the premises of defendant about the 1st day of September, seeking employment; he had a conversation with a watchman for defendant who told him that there was to be no hiring on that day, but to return the following Tuesday; plaintiff appeared on the premises September 8th at about six o'clock in the morning and with several other men passed through an opening in the fence on the VanBuren street side and waited inside, apparently standing next to the so-called temporary fence; about a quarter to seven o'clock there were several thousand men congregating all over the sidewalks and street; about this time the watchman came out of the power house, and when he was seen by the crowd outside the fence it began to move forward toward the fence and crowded up against it and pushed it over from the outside; it struck plaintiff and knocked him down. A witness for plaintiff described the crowd as consisting of several thousand men who came right against the fence, giving it a violent push, when it went over.

Without passing upon the question of the authority of the watchman to tell plaintiff to return, or whether or not plaintiff was an invitee, we are of the opinion that the circumstances support defendant's version of the occurrence. It has been repeatedly held that if a defendant's negligence does nothing more than furnish a condition making the injury possible and injury follows by the subsequent independent act of third persons which could not have been reasonably anticipated, the condition is not the proximate cause of the injury. Mabrey v. Haverstick, 175 Ill. App. 309; Crawford v. Central Ill. Pub. Serv. Co., 235 Ill. App. 339; Enaus v. Southern

Lower windows about every six or eight feet and about two feet on either side of the lower windows; I saw about twenty were nailed onto the windows; the whole lower was about six or seven feet high; the upper-almost upon which is raised were anchored by means of large rings of iron and concrete.

Witness first appeared on the ground at about 10:30 on the day of October, seeking employment; he had a conversation with a witness for defendant who told him that there was to be no hiring on that day, but to return the following Tuesday; witness appeared on the ground between 6:30 and about six o'clock in the morning and with several other men passed through an opening in the fence in the upper street and into inside, standing next to the so-called temporary fence; about a quarter to seven o'clock there were several thousand men congregating all over the square and street; about 7:30 the witness took out of the lower fence, and when he was seen by the crowd outside the fence it began to move forward; toward the fence and avoided no attempt to get out of the crowd; it was then the outside; it was witness and several him down. A witness for plaintiff described the crowd as consisting of several thousand men who came right against the fence, giving it a violent push, when it went over.

Without passing upon the question of the authority of the witness to tell plaintiff to return, or whether or not plaintiff was an invitee, we are of the opinion that the circumstances support defendant's version of the occurrence. It has been repeatedly held that if a defendant's negligence does nothing more than create a condition making the injury possible and injury follows by the independent independent act of third persons which could not have been reasonably anticipated, the condition is not the proximate cause of the injury. McIntosh v. McIntosh, 175 Ill. App. 2d; McIntosh v. McIntosh, 175 Ill. App. 2d; McIntosh v. McIntosh, 175 Ill. App. 2d.

Ev. Co., 245 Ill. App. 192; Munsen v. Ill. Northern Utilities Co., 253 Ill. App. 438; Seith v. Commonwealth Electric Co., 241 Ill. 252; Hartnett v. Boston Store, 265 Ill. 331. The test is whether the party guilty of the alleged negligence might reasonably have anticipated the intervening cause as a natural and probable consequence of his own negligence.

Plaintiff says that he rests his claim solely upon the proposition that the jury should have ^{been} permitted to determine whether defendant should have reasonably anticipated that a crowd might press against the fence so as to upset it. Defendant was not obliged to anticipate the onslaught of several thousand men against the fence, and would not be expected to so construct the fence that it could withstand such enormous pressure. The fence was evidently built to prevent the entrance upon the premises of persons who had no business there. It was not intended to resist the charge of several thousand men moving against it in a body. This was something no reasonable person could foresee or anticipate. We may regret the injury to plaintiff, which seems to have been severe, but he was the unfortunate victim of the movement of a great crowd so eager to secure employment that it advanced regardless of any obstruction in the way.

Cases cited by plaintiff can be readily distinguished. O'Connor v. Brewer, 262 Ill. App. 621, involved the failure of defendant to return a promissory note. In Schwarz v. Adsit et al., 91 Ill. App. 576, defendant's building was damaged by fire and the walls left in such insecure and dangerous condition that the wind blew them down. Jenkins v. Coal Company, 264 Ill. 236, involved the failure of the defendant to have a linch-pin in one of the axles of his dump cart, causing the wheel to come off and roll to one side of the coal shaft; the plaintiff, reaching into the shaft to recover the wheel, was struck on the head by a falling piece of

rock or coal. It was held, following Seith v. Commonwealth Electric Co., supra, that an ordinarily prudent person could not have foreseen that such an accident might be suffered by the plaintiff. Fleming v. City of Chicago, 260 Ill. App. 496, involved the presence of a nuisance upon a public highway. None of these cases is in point.

It has been repeatedly held that the court may properly instruct the jury to return a verdict for the defendant when the evidence, with all the reasonable inferences that may be drawn therefrom, fails to support the allegations of the plaintiff's declaration. Werk v. Illinois Steel Co., 154 Ill. 427; Reidler v. Branshaw, 200 Ill. 425; Wallner v. Chicago Con. Co., 245 Ill. 148.

For the reason that there was no evidence tending to show that the construction of the fence in question was the proximate cause of the injury to plaintiff, the trial court properly instructed the jury to find for the defendant, and the judgment is affirmed.

AFFIRMED.

Matchett and O'Connor, JJ., concur.

...of cost. It was held, following Smith v. Commonwealth, that the plaintiff's burden could not have been ...
...that such an accident might be suffered by the plaintiff.
...Smith v. Commonwealth, 200 Ill. 407, 408, 409, 410, 411, 412, 413, 414, 415, 416, 417, 418, 419, 420, 421, 422, 423, 424, 425, 426, 427, 428, 429, 430, 431, 432, 433, 434, 435, 436, 437, 438, 439, 440, 441, 442, 443, 444, 445, 446, 447, 448, 449, 450, 451, 452, 453, 454, 455, 456, 457, 458, 459, 460, 461, 462, 463, 464, 465, 466, 467, 468, 469, 470, 471, 472, 473, 474, 475, 476, 477, 478, 479, 480, 481, 482, 483, 484, 485, 486, 487, 488, 489, 490, 491, 492, 493, 494, 495, 496, 497, 498, 499, 500, 501, 502, 503, 504, 505, 506, 507, 508, 509, 510, 511, 512, 513, 514, 515, 516, 517, 518, 519, 520, 521, 522, 523, 524, 525, 526, 527, 528, 529, 530, 531, 532, 533, 534, 535, 536, 537, 538, 539, 540, 541, 542, 543, 544, 545, 546, 547, 548, 549, 550, 551, 552, 553, 554, 555, 556, 557, 558, 559, 560, 561, 562, 563, 564, 565, 566, 567, 568, 569, 570, 571, 572, 573, 574, 575, 576, 577, 578, 579, 580, 581, 582, 583, 584, 585, 586, 587, 588, 589, 590, 591, 592, 593, 594, 595, 596, 597, 598, 599, 600, 601, 602, 603, 604, 605, 606, 607, 608, 609, 610, 611, 612, 613, 614, 615, 616, 617, 618, 619, 620, 621, 622, 623, 624, 625, 626, 627, 628, 629, 630, 631, 632, 633, 634, 635, 636, 637, 638, 639, 640, 641, 642, 643, 644, 645, 646, 647, 648, 649, 650, 651, 652, 653, 654, 655, 656, 657, 658, 659, 660, 661, 662, 663, 664, 665, 666, 667, 668, 669, 670, 671, 672, 673, 674, 675, 676, 677, 678, 679, 680, 681, 682, 683, 684, 685, 686, 687, 688, 689, 690, 691, 692, 693, 694, 695, 696, 697, 698, 699, 700, 701, 702, 703, 704, 705, 706, 707, 708, 709, 710, 711, 712, 713, 714, 715, 716, 717, 718, 719, 720, 721, 722, 723, 724, 725, 726, 727, 728, 729, 730, 731, 732, 733, 734, 735, 736, 737, 738, 739, 740, 741, 742, 743, 744, 745, 746, 747, 748, 749, 750, 751, 752, 753, 754, 755, 756, 757, 758, 759, 760, 761, 762, 763, 764, 765, 766, 767, 768, 769, 770, 771, 772, 773, 774, 775, 776, 777, 778, 779, 780, 781, 782, 783, 784, 785, 786, 787, 788, 789, 790, 791, 792, 793, 794, 795, 796, 797, 798, 799, 800, 801, 802, 803, 804, 805, 806, 807, 808, 809, 810, 811, 812, 813, 814, 815, 816, 817, 818, 819, 820, 821, 822, 823, 824, 825, 826, 827, 828, 829, 830, 831, 832, 833, 834, 835, 836, 837, 838, 839, 840, 841, 842, 843, 844, 845, 846, 847, 848, 849, 850, 851, 852, 853, 854, 855, 856, 857, 858, 859, 860, 861, 862, 863, 864, 865, 866, 867, 868, 869, 870, 871, 872, 873, 874, 875, 876, 877, 878, 879, 880, 881, 882, 883, 884, 885, 886, 887, 888, 889, 890, 891, 892, 893, 894, 895, 896, 897, 898, 899, 900, 901, 902, 903, 904, 905, 906, 907, 908, 909, 910, 911, 912, 913, 914, 915, 916, 917, 918, 919, 920, 921, 922, 923, 924, 925, 926, 927, 928, 929, 930, 931, 932, 933, 934, 935, 936, 937, 938, 939, 940, 941, 942, 943, 944, 945, 946, 947, 948, 949, 950, 951, 952, 953, 954, 955, 956, 957, 958, 959, 960, 961, 962, 963, 964, 965, 966, 967, 968, 969, 970, 971, 972, 973, 974, 975, 976, 977, 978, 979, 980, 981, 982, 983, 984, 985, 986, 987, 988, 989, 990, 991, 992, 993, 994, 995, 996, 997, 998, 999, 1000.

It has been repeatedly held that the court may properly ...
...the duty to return a verdict for the defendant when the ...
...with all the reasonable inferences that may be drawn ...
...to return the verdict for the plaintiff's ...
...Smith v. Commonwealth, 200 Ill. 407, 408, 409, 410, 411, 412, 413, 414, 415, 416, 417, 418, 419, 420, 421, 422, 423, 424, 425, 426, 427, 428, 429, 430, 431, 432, 433, 434, 435, 436, 437, 438, 439, 440, 441, 442, 443, 444, 445, 446, 447, 448, 449, 450, 451, 452, 453, 454, 455, 456, 457, 458, 459, 460, 461, 462, 463, 464, 465, 466, 467, 468, 469, 470, 471, 472, 473, 474, 475, 476, 477, 478, 479, 480, 481, 482, 483, 484, 485, 486, 487, 488, 489, 490, 491, 492, 493, 494, 495, 496, 497, 498, 499, 500, 501, 502, 503, 504, 505, 506, 507, 508, 509, 510, 511, 512, 513, 514, 515, 516, 517, 518, 519, 520, 521, 522, 523, 524, 525, 526, 527, 528, 529, 530, 531, 532, 533, 534, 535, 536, 537, 538, 539, 540, 541, 542, 543, 544, 545, 546, 547, 548, 549, 550, 551, 552, 553, 554, 555, 556, 557, 558, 559, 560, 561, 562, 563, 564, 565, 566, 567, 568, 569, 570, 571, 572, 573, 574, 575, 576, 577, 578, 579, 580, 581, 582, 583, 584, 585, 586, 587, 588, 589, 590, 591, 592, 593, 594, 595, 596, 597, 598, 599, 600, 601, 602, 603, 604, 605, 606, 607, 608, 609, 610, 611, 612, 613, 614, 615, 616, 617, 618, 619, 620, 621, 622, 623, 624, 625, 626, 627, 628, 629, 630, 631, 632, 633, 634, 635, 636, 637, 638, 639, 640, 641, 642, 643, 644, 645, 646, 647, 648, 649, 650, 651, 652, 653, 654, 655, 656, 657, 658, 659, 660, 661, 662, 663, 664, 665, 666, 667, 668, 669, 670, 671, 672, 673, 674, 675, 676, 677, 678, 679, 680, 681, 682, 683, 684, 685, 686, 687, 688, 689, 690, 691, 692, 693, 694, 695, 696, 697, 698, 699, 700, 701, 702, 703, 704, 705, 706, 707, 708, 709, 710, 711, 712, 713, 714, 715, 716, 717, 718, 719, 720, 721, 722, 723, 724, 725, 726, 727, 728, 729, 730, 731, 732, 733, 734, 735, 736, 737, 738, 739, 740, 741, 742, 743, 744, 745, 746, 747, 748, 749, 750, 751, 752, 753, 754, 755, 756, 757, 758, 759, 760, 761, 762, 763, 764, 765, 766, 767, 768, 769, 770, 771, 772, 773, 774, 775, 776, 777, 778, 779, 780, 781, 782, 783, 784, 785, 786, 787, 788, 789, 790, 791, 792, 793, 794, 795, 796, 797, 798, 799, 800, 801, 802, 803, 804, 805, 806, 807, 808, 809, 810, 811, 812, 813, 814, 815, 816, 817, 818, 819, 820, 821, 822, 823, 824, 825, 826, 827, 828, 829, 830, 831, 832, 833, 834, 835, 836, 837, 838, 839, 840, 841, 842, 843, 844, 845, 846, 847, 848, 849, 850, 851, 852, 853, 854, 855, 856, 857, 858, 859, 860, 861, 862, 863, 864, 865, 866, 867, 868, 869, 870, 871, 872, 873, 874, 875, 876, 877, 878, 879, 880, 881, 882, 883, 884, 885, 886, 887, 888, 889, 890, 891, 892, 893, 894, 895, 896, 897, 898, 899, 900, 901, 902, 903, 904, 905, 906, 907, 908, 909, 910, 911, 912, 913, 914, 915, 916, 917, 918, 919, 920, 921, 922, 923, 924, 925, 926, 927, 928, 929, 930, 931, 932, 933, 934, 935, 936, 937, 938, 939, 940, 941, 942, 943, 944, 945, 946, 947, 948, 949, 950, 951, 952, 953, 954, 955, 956, 957, 958, 959, 960, 961, 962, 963, 964, 965, 966, 967, 968, 969, 970, 971, 972, 973, 974, 975, 976, 977, 978, 979, 980, 981, 982, 983, 984, 985, 986, 987, 988, 989, 990, 991, 992, 993, 994, 995, 996, 997, 998, 999, 1000.

Waters and O'Connor, Ill., 1900.

MAURICE ELLIN, as Trustee in
Bankruptcy in the Estate of
JAMES H. MONROE,
Appellant,

vs.

JAMES MONROE, SADIE MONROE Individually
and as Executrix of the Estate of
WILLIE WOODSON, Deceased,
Appellees.

APPEAL FROM CIRCUIT
COURT OF COOK COUNTY.

270 I.A. 624²

MR. PRESIDING JUSTICE MESURRY
DELIVERED THE OPINION OF THE COURT.

Plaintiff, as trustee in bankruptcy of the estate of James H. Monroe, filed his bill praying for a conveyance by the defendants of certain real estate located at 4552 Prairie avenue, Chicago; it was alleged that Monroe and his wife had conveyed the premises to Willie Woodson (mother of Sadie Monroe and mother-in-law of James Monroe) with intent to hinder and delay Monroe's creditors; that Monroe and his wife owned the property in joint tenancy from the year 1919 to February 13, 1929; that on this latter date Monroe was insolvent and indebted to Sydney Rubin in the amount of \$500 for rental of a garage, and on that date the Monroes made the alleged fraudulent conveyance in question to Willie Woodson.

Defendants by their joint answer denied that the Monroes owned the property and denied making any fraudulent conveyance; they asserted that the defendant Willie Woodson furnished the purchase price of the property in question and was the actual bona fide owner; that the Monroes held title to it in trust for her, having acted as agents for her in purchasing the property; that the Monroes took title to the property without the knowledge or consent of Willie Woodson and that the conveyance by them to her was not voluntary but was made upon her demand. James Monroe denied that he was indebted to Sydney Rubin in the sum of \$500, and asserted the indebtedness was only \$100 on the date alleged.

AMERICAN TRUST CO. OF
KANSAS CITY, MO.
JAMES M. MONTGOMERY,
President

JAMES MONTGOMERY, as Executor of the Estate of
and as Executor of the Estate of
WILLIE WOODSON, deceased,
Appellants.

STATE OF MISSOURI
COUNTY OF JACKSON

280 I.A. 624

IN SENATE
JANUARY 13, 1933

Michael, as trustee in bankruptcy of the estate of James
M. Montrose, filed his bill praying for a conveyance of the estate
of certain real estate located at 1212 North 12th Street,
Chicago; it was alleged that Montrose and his wife had conveyed the
premises to Willie Woodson (father of said Montrose and nephew-in-
law of James Montrose) with intent to hinder and delay Montrose's
execution; that Montrose and his wife owned the property in joint
tenancy from the year 1919 to February 13, 1933; that on this
latter date Montrose was insolvent and indebted to Sydney Hahn in
the amount of \$200 for rental of a garage, and on that date the
Montroses made the alleged fraudulent conveyance in question to
Willie Woodson.
Defendants by their joint answer denied that the Montroses
owned the property and denied making any fraudulent conveyance;
they asserted that the defendant Willie Woodson furnished the pur-
chase price of the property in question and was the actual bona fide
owner; that the Montroses held title to it in trust for her, having
acted as agents for her in purchasing the property; that the Montroses
took title to the property without the knowledge or consent of
Willie Woodson and that the conveyance by them to her was not
voluntary but was made upon her demand. James Montrose denied that
he was indebted to Sydney Hahn in the sum of \$200, and asserted
the indebtedness was only \$100 on the date alleged.

The cause was referred to a master in chancery, who took evidence and made his report recommending a decree in accordance with the prayer of the bill.

Subsequent to the taking of testimony before the master Willie Woodson died; her death was suggested and Sadie Monroe, as executrix, was substituted as party defendant and the cause was ordered to proceed without prejudice to the proceedings.

Exceptions were filed to the master's report and sustained by the chancellor and a decree was entered finding the equities with the defendants and ordering that the bill be dismissed for want of equity. Complainant appeals to this court.

The question presented is largely one of fact. Willie Woodson was the mother of Sadie Monroe, who was the wife of James H. Monroe; all of these defendants formerly lived in Birmingham, Alabama. James and Sadie Monroe were married in 1915 and in 1916 came to Chicago to live. James Monroe had worked as a Pullman porter at a salary of \$30 a month and at the time of the purchase of the property in question had no money and was contributing very little to his wife's support.

Sadie Monroe prior to her marriage had, by savings from her earnings and a present from her father on her marriage, accumulated about \$1000 which she brought with her to Chicago; after coming here she continued to be employed, selling dresses.

Mrs. Woodson remained in Birmingham, Alabama, for a time after the marriage of her daughter; she was a woman of meager education, by occupation a cook and general housekeeper, and kept roomers; by this means she had in December, 1918, accumulated \$1500 as her life savings. During the holiday season of 1918 Sadie Monroe visited her mother in Birmingham; they talked together about buying property and the mother told her daughter of her \$1500 saved and said she would like to buy some property as she was getting old

The cause was referred to a master in chancery, who took evidence and made his report recommending a decree in accordance with the prayer of the bill.

Subsequent to the taking of testimony before the master Willis Woodson died; her death was suggested and Josie Monroe, as executrix, was substituted as party defendant and the cause was ordered to proceed without prejudice to the proceedings. Exceptions were filed to the master's report and sustained by the chancellor and a decree was entered finding the parties with the defendants and ordering that the bill be dismissed for want of equity. Complainant appeals to this court.

The master presided in equity and of said Willis Woodson was the mother of Josie Monroe, who was the wife of James E. Monroe; all of these defendants formerly lived in Birmingham, Alabama. James and Josie Monroe were married in 1918 and in 1919 came to Chicago to live. James Monroe had worked as a salesman for at a salary of \$300 a month and at the time of the purchase of the property in question had no money and was contributing very little to his wife's support.

Josie Monroe prior to her marriage had, by savings from her work and a present from her father on her marriage, accumulated about \$1000 which she brought with her to Chicago; after coming here she continued to be employed, selling dresses.

Mrs. Woodson remained in Birmingham, Alabama, for a time after the marriage of her daughter; she was a woman of modest means, by occupation a cook and general housekeeper, and kept rooming by this means she had in December, 1919, accumulated \$1200 as her life savings. During the holiday season of 1919 Josie Monroe visited her mother in Birmingham; they talked together about buying property and the mother told her daughter of her \$1200 saved and told her what life to buy some property as she was getting old

and could no longer work; the daughter suggested that they put their savings together and buy some property in Chicago, to which the mother said she wanted the property in her own name as she was afraid of her son-in-law, James Monroe; the mother gave Sadie her \$1500 with instructions to look into some property and to inform her mother. Sadie, upon her return to Chicago, investigated the property in question at 4552 Prairie avenue and wrote her mother recommending it as a purchase; that \$2500 cash was required, and suggesting that she put her \$1000 with her mother's \$1500 and buy the property. To this Mrs. Woodson wrote that if the property was bought in her own name it would be all right, but if it was not bought in her, Willie Woodson's, name it would not be all right.

The property was purchased in January, 1919, and \$2500 was paid in cash, subject to a mortgage. The real estate agent who acted in the matter advised them that since Mrs. Woodson was in Alabama it would be better for the Monroes to take title in their own names, otherwise they might have difficulty in getting a renewal of the mortgage with Mrs. Woodson away in the South; This advice was followed and title was taken in the name of James H. Monroe and Sadie Monroe as joint tenants. Although it is strongly urged to the contrary, based on misinterpretation of the testimony, it is clearly established that James Monroe paid nothing on the purchase price. The chancellor found that the purchase price was paid solely by money belonging to and furnished by Willie Woodson, together with money paid by Sadie Monroe for and on behalf of Willie Woodson, and that James H. Monroe did not pay any money upon the purchase price of the property and accordingly had no interest of ownership therein. This conclusion of the chancellor was justified.

The facts call for the application of the well established rule that where money is placed in the hands of an agent to buy

and could be bought for the lowest possible price, and
their savings together and buy some property in Chicago, to which
the mother said she wanted the property in her own name as she was
afraid of her son-in-law, James Monroe; the mother gave Gaila her
\$1000 with interest and in fact later some property and so later
her mother, Willie, when not certain in Chicago, investigated the
property in question at 4888 Franklin Avenue and wrote her mother
recommending it as a purchase; that \$2500 cash was required, and
suggesting that she put \$1000 with her mother's \$1500 and buy
the property. To this Mrs. Woodson wrote that if the property was
bought in her own name it would be all right, but if it was not
bought in her, Willie Woodson's, name it would not be all right.
The property was purchased in January, 1919, and \$2500
was paid in cash, subject to a mortgage. The real estate agent
and what is now called advised them that since Mrs. Woodson was
in Chicago it would be better for the Monroes to take title in
their own names, otherwise they might have difficulty in getting
a removal of the mortgage with Mrs. Woodson away in the South;
this advice was followed and title was taken in the name of James
H. Monroe and Gaila Monroe as joint tenants. Although it is
strongly urged to the contrary, based on misinterpretation of the
testimony, it is clearly established that James Monroe paid nothing
on the purchase price. The chancellor found that the purchase
price was paid solely by money belonging to and furnished by
Willie Woodson, together with money paid by Gaila Monroe for and
on behalf of Willie Woodson, and that James H. Monroe did not pay
any money over the purchase price of the property and accordingly
had no interest of ownership therein. This conclusion of the
chancellor was justified.
The facts call for the application of the well established
rule that where money is placed in the hands of an agent to buy

property in the name of a principal and the agent takes title in his own name, a trust results for the benefit of the principal. Dwyer v. O'Connor, 200 Ill. 52; Morton v. Nelson, 145 Ill. 586; Cookson v. Richardson, 69 Ill. 137; Keese v. Strawn, 14 Ill. 94.

Sydney Rubin testified on behalf of complainant that he leased a garage to James M. Monroe in May, 1927, for a term of two years; that during the negotiations for the lease Monroe represented to the witness that he was the owner of the premises at 4552 Prairie avenue; that the witness verified this by the records in the recorder's office, and relying thereon entered into a written lease; the father of Sydney Rubin testified that he was present at the negotiations, and corroborated his son. James Monroe testified, denying he made any representations to the Rubins that he owned the property. Some of the tax bills were made out in the name of James Monroe. We do not see how any such acts could destroy the interest of Mrs. Woodson, the real owner.

In July, 1919, Mrs. Woodson came to Chicago; this was about six months after the property was purchased. Sadie Monroe testified she did not inform her mother that the title was not in her name for fear she would not understand. All three of the defendants occupied one of the apartments in the building. Mrs. Woodson testified that she turned the management of the property over to her daughter. Mrs. Woodson took employment in Chicago and for a time in Janesville, Wisconsin. In answer to the question whether she expected to return to "the daughter's home" she replied, "No, they were living with me. They lived at my place." The daughter collected the rents of the other apartments in the building and deposited them in the bank for her mother; she also paid the taxes. Mrs. Woodson had a bank account in three banks and was owner of four shares of stock in one of them. Real estate agents collected the rents for awhile. It is not of controlling importance that James Monroe signed the letter

property in the name of a principal and the agent takes title in
his own name, a trust results for the benefit of the principal.
UNITED STATES v. HARRIS, 100 U.S. 43; HARRIS v. HARRIS, 100 U.S. 43;
UNITED STATES v. HARRIS, 100 U.S. 43; HARRIS v. HARRIS, 100 U.S. 43.
Sydney Harris testified on behalf of complainant that he
issued a check to James E. Henson in May, 1907, for a term of two
years, that said Henson was the owner of the premises at 1234
to the witness that he was the owner of the premises at 1234
evening; that the witness testified that by the records in the re-
cord's office, and relying thereon entered into a written lease;
the fact of said lease testified that he was aware of the
agreement, and corroborated his son, James Henson testified,
saying he made any representations to the witness that he owned the
property. Some of the tax bills were made out in the name of James
Henson. He did not see any other bills which would destroy the interest
of Mrs. Woodson, the real owner.
In July, 1910, Mrs. Woodson came to Chicago; this was about
six months after the property was purchased. Said Henson testified
that he did not inform her mother that the title was not in her name for
that she would not understand. All three of the defendants occupied
one of the apartments in the building. Mrs. Woodson testified that
she turned the management of the property over to her daughter, Mrs.
Woodson took employment in Chicago and for a time in Jacksonville,
Florida. In answer to the question whether she expected to return
to the country's home, she replied, "No, they were living with me,
they lived at my place." The daughter collected the rents of the
apartments in the building and deposited them in the bank
for her mother; she also paid the taxes. Mrs. Woodson had a bank
account in three banks and was owner of four shares of stock in one
of them. Real estate agents collected the rents for awhile. It is
not at all surprising to find that James Henson signed the latter

to the agents giving them authority to procure tenants, referring to the property as "my property."

These facts indicate that all three of the defendants treated the property as belonging to Mrs. Woodson. That she turned over the management of the finances to her daughter only confirms her testimony to the effect that she had absolute confidence in her. We do not see how the wording of the letter to the real estate agents could have misled Rubin into thinking Monroe owned the property, for that letter was written about seven years before Rubin met Monroe.

In February, 1924, Mrs. Woodson overheard a quarrel between James Monroe and his wife Sadie in which Sadie was heard to say to her husband that if he was leaving, he should give back the property to her mother, "in her name because it is hers." Thereupon Mrs. Woodson asked her daughter what she meant by these words, and when told demanded the conveyance of the property to her and conferred with an attorney in regard to the same, and pursuant to this demand the premises were conveyed to her for \$1 and other good and valuable consideration.

In Behrens v. Steidley, 198 Ill. 303, the property was conveyed to the husband by his father-in-law for the benefit of the wife, in 1880, and eighteen years later the husband conveyed it to his wife; creditors sought to set this aside as a fraud. It was held that the land equitably belonged to the wife although the legal title was in the husband, and that if the equity of the wife is "first in time, first in right and first consummated by conveyance vesting her with legal title, that title will be sustained."

No argument can be built upon the supposition that Mrs. Woodson held out James Monroe as the owner of the property or permitted him to act so as to give third persons credit on the strength of such alleged ownership. Mrs. Woodson did not know that title to the premises was in the name of James and Sadie Monroe and not in her

to the agents giving them authority to procure bonds, returning
to the property as "my property."
These facts indicate that all three of the defendants pressed
the property as belonging to Mrs. Woodard. There was no record over the
management of the finances to not designate only certain her estate
money to the estate fund and absolute confidence in her. We do
not see how the wording of the letter to the bank estate agents
could have misled them into believing money owned the property.
For that letter was written about seven years before which was
written.
In February, 1901, Mrs. Woodard executed a power of attorney
James Woodard and his wife in which said in which was made to say to
her husband that if he was leaving, he should give back the property
to her mother, "in her name because it is hers." Whereupon the
Woodard asked her daughter what she meant by these words, and when
told demanded the conveyance of the property to her and conveyed
with an attorney in regard to the same, and pursuant to this demand
the premises were conveyed to her for \$1 and other good and value.
This constituted.
In James Y. Woodard, et al. vs. Mrs. Woodard, the property was
vested in the husband by his father-in-law for the benefit of his
wife, in 1880, and eighteen years later the husband conveyed it to
his wife; creditors sought to set this aside as a fraud. It was
held that the land equitably belonged to the wife although the
legal title was in the husband, and that if the equity of the wife
is "lost in time, time is right and that cannot be recovered by conveyance
vested her with legal title, that title will be maintained."
It is argued that the facts upon the matter stated that Mrs.
Woodard held out James Woodard as the owner of the property or per-
mitted him to act as if he were the owner, and that the property
is such alleged ownership. Mrs. Woodard did not know that title to
the premises was in the name of James and Emily Woodard and not in her.

As soon as she learned of this she demanded and received the conveyance.

In May, 1929, Sydney Rubin got a judgment by default against James H. Monroe for rent, and in September, 1929, sought to garnish the rents from the property in question; Mrs. Woodson filed an intervening petition in this case in which she asserted that she became the owner of the premises on February 13, 1929, "by purchase." This was a proper form in which to assert title in the action at law and it does not contradict her equitable interest prior to receiving legal title. One is not estopped in an equity proceeding because he pleaded only a legal defense in an action at law. Stattel et al. v. Chicago Title & Trust Co., 218 Ill. App. 75. As a general rule, if one receives land, not by descent, it may be legally described as a purchase. Whithead on Illinois Real Property, vol. 1, sec. 39.

Complainant makes the point that where several persons contribute to the purchase price of real estate, in order that a resulting trust arise it must appear that the sums severally contributed were for some definite or distinct part of the estate; citing Kinsch v. Kinsch, 348 Ill. 446, and other cases. That case arose out of a contest over real estate between the holder of the title (the widow of the former owner) and his children by a former wife; the children claimed an interest by virtue of a series of contributions made by them, generally indefinite in amount and extending over a period of time. It was there held that a resulting trust does not arise by reason of payments made not coincident with the purchase of the property and for no distinct interest or definite part of the estate. In the instant case there is no contest between the holder of the title, James H. Monroe, and Mrs. Woodson; he does not claim any interest in the property, neither does Sadie question her mother's ownership, and it was established that Mrs. Woodson

As soon as the learned of this the deceased and received the same

In May, 1897, Sydney Smith took a judgment by default

against James H. Monroe for rent, and in September, 1897, bought the

premises the same were then conveyed to Sydney Smith, deceased

filed an intervening petition in this case in which she asserted

that she became the owner of the premises on February 13, 1897, "by

purchase." This was a proper time in which to assert title in the

action as law and it does not constitute her equitable interest

prior to receiving legal title. One is not entitled in an equity

proceeding because he pleaded only a legal defense in an action at

law. Winnick v. M. Y. Chicago Title & Trust Co., 115 Ill. App. 70.

In a recent case, it was further held, and is stated, it may be

legally described as a purchase. Widdowson on Illinois Real Prop.

erty, vol. 1, sec. 39.

Equitable claims are not barred by the statute of limitations

relative to the purchase price of real estate, in order that a re-

scinding trust arise it must appear that the same estate is contin-

gued were the same estate or distinct part of the estate; if

King v. King, 243 Ill. 440, and other cases. That case arose

out of a trust over real estate between the sister of the sister

(the sister of the former owner) and his children by a former wife;

the relation claimed an interest by virtue of a series of contribu-

tions made by them, generally indefinite in amount and extending

over a period of time. It was there held that a resulting trust

does not arise by reason of payments made not coincident with the

purchase of the property and for no distinct interest or definite

part of the estate. In the instant case there is no contact between

the holder of the title, James H. Monroe, and Mrs. Widdowson; no

definite and interest in the property, neither does Smith possess

any woman's ownership, and it was established that Mrs. Widdowson

would not invest her money unless title would be taken in her name. The creditors are not interested in whether Sadie loaned \$1000 to her mother in order to make up the cash payment. The relationship of the parties is merely a circumstance which may excite suspicion but does not, alone, amount to proof of fraud. Garrett v. Garrett, 343 Ill. 577. The chancellor was justified in finding that the evidence failed to prove fraud in the instant case.

Another obstacle in the way of granting the relief sought by the bill of complaint is, that although it alleges the insolvency of James H. Monroe on February 13, 1929, the date of the conveyance to Mrs. Woodson, there is no proof of this. Sydney Rubin testified that on this date James Monroe was indebted to him in the amount of \$500 for rent of a garage; Monroe denied that he was indebted to this amount but admits an indebtedness of about \$100. An analysis of the testimony indicates that Monroe's version was correct.

Complainant cites the filing of Monroe's petition in bankruptcy about eight months after the conveyance to Mrs. Woodson. We cannot presume from this that insolvency existed eight months before. The burden of proof is on the one claiming insolvency to establish it, Willson v. Labhart, 269 Ill. App. 53. Other points are made, in exceptionally well written briefs, which we do not deem it necessary to discuss in this opinion.

Upon the entire record we are convinced that the chancellor properly sustained exceptions to the master's report and ordered the dismissal of the bill. The decree is therefore affirmed.

AFFIRMED.

Witchett and O'Connor, JJ., concur.

would not invest her money unless this would be taken in her
 name. The evidence was not interested in whether this loaned
 money to her mother in order to make up the cash payment. The
 statements of the parties is clearly a statement which may
 create suspicion but does not, alone, amount to proof of fraud.
Barrett v. Barrett, 233 Ill. 237. The chancellor was justified in
 finding that the evidence failed to prove fraud in the instant case.
 Another obstacle in the way of granting the relief sought
 by the bill of complaint is, that although it alleges the ineq-
 uity of James M. Barrett on February 12, 1922, the date of the con-
 veyance to Mrs. Barrett, there is no proof of this. Although it is
 testified that on this date James Barrett was indebted to his wife in the
 amount of \$200 for rent of a garage; Barrett denied that he was in-
 debted to this amount but admits an indebtedness of about \$100. An
 analysis of the testimony indicates that Barrett's version was cor-
 rect.
 Inasmuch as the bill of complaint alleges to have
 taken about six months after the conveyance to Mrs. Barrett. No
 exact account has been introduced which would indicate the
 date. The burden of proof is on the bill of complaint.
Barrett v. Barrett, 233 Ill. 237. The chancellor
 was, in exceptionally well written briefs, which we do not
 deem it necessary to discuss in this opinion.
 Upon the entire record we are convinced that the chancellor
 properly sustained exceptions to the master's report and ordered the
 dismissal of the bill. The decree is therefore affirmed.

ATTORNEYS

36581

J. J. STANLEY and CHARLES J.
STANLEY, Co-partners, Doing Business
as J. J. STANLEY,

Appellants,

vs.

ELMER G. OLSON et al.,

Appellees.

APPEAL FROM CIRCUIT

COURT OF COOK COUNTY.

270 I.A. 624³

MR. PRESIDING JUSTICE MCBURELY
DELIVERED THE OPINION OF THE COURT.

Complainants appeal from an order dismissing their bill which sought to establish a mechanic's lien.

The bill claimed \$2500 as the balance due on a contract for plumbing work installed by complainants on premises belonging to defendants. The matter was referred to a master in chancery who reported, recommending a decree for complainants; subsequently, on August 12, 1932, a decree was entered overruling the exceptions and finding the complainants were entitled to a lien; on October 7th, at a subsequent term of court, the Chancellor, Judge Hugo Friend, gave the defendants leave to file their petition seeking to vacate the decree; answer to the petition was filed and on October 15th the Chancellor entered an order vacating the decree entered August 12th and set for hearing the exceptions to the master's report; December 8th, after hearing, a decree was entered finding the equities for defendants and the bill of complaint was ordered dismissed.

Upon this appeal complainants challenge the power of the court to vacate the prior decree and also assert that the conclusions of the Chancellor upon the merits are not justified.

The facts relating to the order vacating the decree are as follows. On February 15, 1932, Judge Klarkowski ordered the hearing on the exceptions to the master's report placed on his contested motion calendar to be heard in due course; no move was

J. L. STANLEY and THOMAS A. STANLEY, Plaintiffs,
vs.
J. L. STANLEY, Defendant.

Case No. 1000

1000

THOMAS A. STANLEY, et al.,
Defendants.

APPEAL FROM CIRCUIT
COURT OF THE COUNTY.

280 I.A. 624

THE STANLEY TRUST COMPANY
MAINTAINS THE OPINION ON THE CASE.

Complainant appeals from an order dissolving their bill

which sought to establish a mechanic's lien.

The bill claimed that the plaintiff was a mechanic

and that he had performed work on the premises in dispute

in the premises. The bill was returned in a matter in equity

and sought, among other things, a decree for specific performance

of a contract made by the defendant with the plaintiff

and that the complainant was entitled to a lien on the premises

and, as a consequence of said lien, the defendant, John W. W.

Wright, gave the defendant leave to file their petition seeking

to vacate the decree; wherefore the petition was filed and to

October 15th the Chancellor entered an order vacating the decree

and entered a decree affirming the decree in the

matter's favor. December 22nd, after hearing, a decree was entered

affirming the opinion of the Chancellor and the bill of complaint was

dismissed.

Upon this appeal complainant challenges the power of the

court to vacate the order decree and also asserts that the complainant

is entitled to the decree and that the matter was not settled.

The facts relating to the order vacating the decree are

as follows. On February 11, 1911, John W. W. Wright entered his

petition in the execution of the master's report placed on his

petitioned motion calendar to be heard in the court; no more was

made by either party to have this set for an early hearing and it was still on the contested motion calendar when the court entered the summer vacation, which began July 16th; Judge William V. Brothers was assigned to sit as a judge to hear emergency matters for the week beginning August 5th; August 12th a solicitor for complainants appeared before Judge Brothers and presented what purported to be a notice of a motion to hear the exceptions to the master's report, served by mailing; the alleged notice was addressed to C. T. Langbein, Jr.; the solicitors for defendants entered of record were Otto T. Langbein, Jr., and E. A. Salsen, Jr.; the affidavit of mailing stated that the solicitor for complainants served a copy of the notice upon the solicitors at their respective addresses "by placing a true and correct copy thereof in a stamped, addressed envelope and depositing same in the United States mail at 35 South Clark street, Chicago, Illinois, on the 9th day of August, A. D. 1932." Rule 21 of the Circuit court provides in part that when notice is given by mail, the motion on presentation to the court must be accompanied by an affidavit of the person who mailed the notice, stating the time and place of the mailing, "together with the complete address appearing on the envelope." The affidavit of service failed to comply with this rule as it did not purport to give the address appearing on the envelope. In his affidavit supporting his petition to vacate the decree of August 12th, Otto T. Langbein, Jr., stated that he had an office in Room 1004, 105 South LaSalle street, Chicago, at this time, and both he and his office associate made affidavits that all of the mail delivered to the office was inspected and that no mail purporting to be a notice or document in the case was ever received. Rule 20 of the Circuit court provides that no motion will be heard or order made without notice to the opposite party, with certain exceptions not material

made by either party to have this set for an early hearing and it was still on the contested motion calendar when the court ruled the matter was settled, which began July 1932; before William V. Brooks was assigned to sit as a judge to hear emergency matters for the week beginning August 28th; August 18th a solicitor for defendant's motion before Judge Brooks was presented what purported to be a notice of a motion to hear the questions as the master's report, served by mailing; the alleged notice was addressed to E. T. Langbein, Jr.; the solicitor for defendant's motion to remove from the case, E. T. Langbein, Jr., and E. T. Langbein, Jr.; the affidavit of mailing stated that the solicitor for defendant's motion served a copy of the notice upon the solicitors as their respective addresses "by placing a true and correct copy thereof in a stamped, addressed envelope and depositing same in the United States Mail at 35 South Clark Street, Chicago, Illinois, on the 22nd day of August, A. D. 1932." Rule 21 of the Illinois Court Rules is that when notice is given by mail the notice of presentation to the court must be accompanied by an affidavit of the person who mailed the notice, stating the time and place of the mailing, "together with the complete address appearing on the envelope." The affidavit of service failed to comply with this rule as it did not purport to give the address appearing on the envelope. In his affidavit supporting his petition to vacate the decree of August 18th, Otto T. Langbein, Jr., stated that he had an office in Room 1004, 102 South La Salle Street, Chicago, at this time, and both he and his office assistant made affidavit that all of the mail delivered to the office was inspected and that no mail purporting to be a notice or document in the case was ever received. Rule 20 of the Illinois Court Rules that no notice will be heard or order made without notice to the opposite party, with certain exceptions not material

here.

Although certain decisions are said to support the contention that a chancellor cannot vacate a decree after the term at which it was entered has passed save on a bill of review or a bill to impeach the decree for fraud, yet the facts in those cases can be distinguished from those in the instant case. In Tosetti Brewing Co. v. Kochler, 200 Ill. 369, the order vacating was made pursuant to a motion to the effect that the solicitor for the other party had by misrepresentation procured the court to enter the decree; on the face of the record the decree appeared to be regularly and properly entered. But whatever expressions may be found in the opinions in such cases, the right of the court to vacate a decree after term time, under such circumstances as we have here, has been definitely settled in North Avenue Bldg. Assoc. v. Huber, 286 Ill. 375, and Kemper v. Weber, 318 Ill. 494. There, as here, a petition was filed to set aside a previous order dismissing the bill for the reason that no notice was given to the other party, which was against the express rule of practice of the Circuit court. In the former case the court said: "It requires no further argument to show that plaintiff's in error were not bound by such order of court and that it was such an order as might be set aside at any time during the term when made, or at a subsequent term, where no discovery of such order is made by the parties injuriously affected thereby until such subsequent term." These decisions are conclusive, and Judge Friend properly set aside the prior decree of August 12th.

Defendants were erecting a building containing four stores and sixteen apartments and the contract for plumbing, gas fitting and sewage was let to complainants, - the work to be done for \$7000; complainants have been paid \$4500 of this and seek a lien for the balance of \$2500. Defendants assert and the chancellor

Although certain decisions are said to support the position
that a chancellor cannot vacate a decree after the term at
which it was entered has passed save on a bill of review or a bill
to impeach the decree for fraud, yet the facts in these cases can
be distinguished from those in the instant case. In Leitch v. Leitch,
100 U.S. 270, the order vacating was made pur-
suant to a motion to the effect that the solicitor for the other
party had by misrepresentation procured the court to enter the de-
cree; on the face of the record the decree appeared to be regu-
larly and properly entered. But whatever exceptions may be found
in the relation in such cases, the result of the court is to make a
decree after that time, subject to the same as to the other
cases. The court has also decided in Leitch v. Leitch, 100 U.S. 270,
100 U.S. 270, and Leitch v. Leitch, 100 U.S. 270, that
a petition may filed to set aside a previous order dissolving the
bill for the reason that no motion was given to the other party,
which was against the express rule of practice of the United States
Court. In the former case the court said: "The practice in former times
was to show that a bill of review is proper where not found by such order
of court and that it was given an order as might be set aside at
any time during the term when made, or at a subsequent term, where
no discovery of such error is made by the parties before the
final decree shall have been entered." These decisions are
conclusive, and Judge Field properly set aside the prior decree
at August term.

Let us now consider a bill of review containing facts which
and which are material and the subject of dispute, and which
and which are not in dispute. - The work to be done for
these; and it has been said that of this and such a bill
for the purpose of \$2500. Defendants answer and the chancellor

found that the last labor and material were furnished in November, 1928, and therefore, as complainants' bill was not filed until March 20, 1931, it was not in compliance with the statute which required suits to enforce mechanic's liens to be commenced within two years after the completion of the work. Para. 9, ch. 82, Illinois Statutes (Cahill.)

Complainants insist, however, that the last work was on March 21, 1929. An employee of complainants testified that he did some work on that date; he had no independent recollection of the date but based his testimony upon a ticket or statement he made at the time; this witness testified that he installed some closet seats, fixed some stove pipe and some faucets; the ticket made by him gives an itemized statement of the work and shows that six faucet washers were installed which cost two cents, and one stove elbow which cost twenty cents; the statement does not specify any closet seats. On the other hand there was abundant evidence that the work was completed in November, 1928. Five witnesses testified that the work was checked up at this time and found complete; from October 22, 1928, to February 16, 1929, thirteen of the sixteen apartments were rented and occupied by tenants; a report of the Bureau of Water of the City of Chicago shows an inspection of the work in December, 1928, as completed. Complainants gave a waiver of lien in August, 1928, for the installation of all the work except attaching fixtures. It would hardly take to the following March to attach the fixtures. If complainants' employee did any work on March 21, 1929, it was of such an inconsequential character that it could not be considered as an extension of the time for completing the work. In Alexander Hendry Co. v. Moor, 242 Ill. App. 516, it was held that such trivial and inconsequential work could not be "tacked on" as part of the original contract, citing many cases. See also Schaller-Hoerr Co. v. Gentile, 153

Ill. App. 458, where it was held that putting up a wire screen after the contract had been substantially finished should not be deemed effectual to revive a lien; and in Morgan v. O'Malley Lbr. Co., 7 Pac. Rep. (2nd) 252, it was held that a building, as respects time for filing liens, is completed when the contractor has substantially complied with the terms of his contract, and the later work of supplying trifling items will not be considered as postponing the time limitation for filing liens. See also Grettenberg v. Collman, 5 Pac. Rep. (2nd) 944, and Gen State Lbr. Co. v. Witty, 37 Idaho, 499. Matot v. Barnhiesel, 212 Ill. App. 489, cited by complainants is not substantially in conflict. The chancellor in the instant case was justified in finding that March 21, 1929, was not the date upon which the last material was furnished or labor performed.

A fact which might explain the delay in the filing of complainants' bill is that defendant Olson gave complainants notes aggregating \$2500 secured by a trust deed on other property; defendants claim this was accepted as payment of the balance, but complainants assert it was given merely as security. Apparently this was treated by both parties as payment. In March, 1931, Charles Stanley, one of the complainants, told one of the defendants that he had sold these notes to the bank under a guaranty, and that as the interest due in January had not been paid the bank was calling on him for payment under his guaranty.

However this may be, the bill was properly dismissed for the reason that it was not filed within the statutory period of time, and the judgment of the Circuit court is affirmed.

AFFIRMED.

Matchett and O'Connor, JJ., concur.

111. App. 480, where it was held that putting up a white person after the contract had been substantially finished should not be deemed attempted to revive a lien; and in Boyd v. O'Connell, 111. App. 480, (2nd) 200, it was held that a building, as respects time for filing lien, is completed when the contractor has substantially complied with the terms of his contract, and the later work of supplying finishing items will not be considered as postponing the time limitation for filing lien. See also Boyd v. O'Connell, 111. App. 480, (2nd) 200, and Boyd v. O'Connell, 111. App. 480, (2nd) 200, and Boyd v. O'Connell, 111. App. 480, (2nd) 200. The distinction is that in the latter case was justified in filing lien March 21, 1912, was not the date upon which the last material was furnished or labor performed.

A fact which might explain the delay in the filing of complaint, viz. in that defendant O'Connell gave complainant notes aggregating \$2000 secured by a trust deed on other property; defendant claim this was accepted as payment of the balance, but complainant asserts it was given merely as security. Apparently this was treated by both parties as payment. In Boyd v. O'Connell, 111. App. 480, one of the complainants, said one of the defendants that he had sold these notes to the bank under a guaranty, and that on the 1st of January 1912 and soon after the bank was calling on him for payment under his guaranty. However this may be, the bill was properly amended for the reason that it was not filed within the statutory period of time, and the judgment of the Circuit court is affirmed.

36590

KING G. MATTHEWS,
Appellee,

vs.

JACOB HAYDEN, Trading as NORTH
SHORE DISCOUNT CO., and M. L. PERKELL,
Appellants.

70 H
APPEAL FROM MUNICIPAL
COURT OF CHICAGO.

270 I.A. 624⁴

MR. PRESIDING JUSTICE McSURELY
DELIVERED THE OPINION OF THE COURT.

Plaintiff, in an action of trover involving an automobile, upon trial by the court had a judgment for \$200, from which defendants appeal.

In this court they first complain of the refusal of the trial court to grant a motion for change of venue. When the case was called for trial counsel for defendants stated that they wanted a change of venue; counsel for plaintiff was ready for trial; the court suggested that a proper petition should be filed and intimated that if it was statutory in form the motion would be granted; the court then passed the case for half an hour in order to give defendants' counsel time to prepare his petition for change of venue. When the petition was presented it was signed by only one of the defendants, M. L. Perkell; the court called attention to this, and as the other defendant, Jacob Hayden, did not appear to sign the petition and, indeed, did not appear at all upon the trial, the motion was denied.

The statute provides that where there are two or more defendants a change of venue shall not be granted upon defendants' motion unless the application is made by all the defendants; that every application for change of venue shall be by petition, verified by the affidavit of the applicant. Pars. 1, 3, 9, ch. 146 Ill. Stat. (Cahill.) No change of venue will be granted unless a proper petition is submitted. The People v. Lee, 311 Ill. 552; Caney v. Retail Clerks' Union et al., 326 Ill. 405.

KING, W. MATTHEW, JR.
appealed.

78.

JAMES BAKER, Jr., Justice of the Peace,
County of Cook, Ill., vs. W. L. BAKER, Jr.,
Defendant.

AMOUNT WHEN RETURNED
COUNT OF JUDGES.

270 I.A. 624

RECEIVED THE CLERK OF THE COURT
JANUARY 10, 1900

Plaintiff, in an action of trover involving an undelivered
wagon tried by the court and a judgment for \$1000, from which defendant
has appealed.

In this court there were two complaints of the defendant of the
trial court to try a motion for judgment of acquittal. When the case
was called for trial the trial court ordered the defendant to state what they wanted
a change of venue; because the plaintiff was ready for trial; the
court suggested that a proper motion should be filed and instructed
that it is was necessary in this the motion would be granted; the
court then passed the case for half an hour in order to give defendant
time to consider if he wanted his motion for change of venue. When
the motion was presented it was signed by only one of the defendant
and, W. L. Baker; the court called attention to this, and on the
other defendant, James Baker, Jr. did not appear to sign the motion
and, indeed, did not appear at all upon the trial, the motion was
denied.

The statute provides that where there are two or more de-
fendants a change of venue shall not be granted upon defendant's
motion unless the application is made by all the defendants. This
court's decision for change of venue shall be by petition, verified
by the affidavit of the applicant. Laws, 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 47, 48, 49, 50, 51, 52, 53, 54, 55, 56, 57, 58, 59, 60, 61, 62, 63, 64, 65, 66, 67, 68, 69, 70, 71, 72, 73, 74, 75, 76, 77, 78, 79, 80, 81, 82, 83, 84, 85, 86, 87, 88, 89, 90, 91, 92, 93, 94, 95, 96, 97, 98, 99, 100.

The trial court gave every consideration to the defendants in considering this motion, but in view of the failure to follow the statute the motion for change of venue was properly denied.

The plaintiff testified that he owned the automobile in question, having purchased it in May, 1931; it is conceded that it was taken from him on the afternoon of August 12, 1932; very shortly afterward the defendant, Mr. Hayden, called plaintiff by telephone and informed him that he was the man who had caused the automobile to be removed and that it was in his warehouse; Mr. Hayden again called plaintiff over the telephone and advised him that Mr. Perkell, the other defendant, would be in his, Hayden's, office at four o'clock to act regarding the automobile; about August 28th plaintiff saw Mr. Hayden driving plaintiff's automobile. The defendants relied upon a note given by plaintiff, secured by a chattel mortgage conveying the automobile as security to M. L. Perkell, and it is asserted that because of plaintiff's failure to pay a monthly installment according to the terms of the note, they were entitled under the terms of the chattel mortgage to declare all of the installments of the note due and to take immediate and exclusive possession of the property. The execution of the note and chattel mortgage is conceded by plaintiff, but he asserts that the same are void for the reason that the loan was made at a greater rate of interest than 7 per cent per annum; that the lender did not have a license to make such a loan, and that the transaction was in violation of the Small Loans Act, para. 27, ch. 74, (Cahill.) This act provides in substance that it shall be unlawful to make any loan of money in the amount of \$300 or less and charge or contract for or receive a greater rate of interest than 7 per cent per annum without first obtaining a license from the Department of Trade and Commerce, and that such license shall be kept in a conspicuous position in the place of business of the licensee. Defendants had no such license.

Plaintiff negotiated with both Mr. Hayden and Mr. Perkell

The trial court gave every consideration to the defendant in considering this motion, but in view of the failure to follow the statute the motion for change of venue was properly denied.

The plaintiff testified that he owned the automobile in question, having purchased it in May, 1931; it is conceded that it was taken from him on the afternoon of August 12, 1932; very shortly thereafter the defendant, Mr. Johnson, advised plaintiff by telephone and informed him that he was the man who had caused the automobile to be taken and that it was in his possession; Mr. Johnson also called plaintiff over the telephone and advised him that Mr. Berkoff, the other defendant, would be in his, Johnson's, office at four o'clock in the afternoon; about August 12, 1932, plaintiff called Mr. Johnson advising plaintiff's automobile. The defendant called upon a note given by plaintiff, secured by a chattel mortgage covering the automobile as security to E. J. Berkoff, and it is admitted that plaintiff's failure to pay a weekly installment amounted to the issue of the note, which was binding upon the terms of the chattel mortgage to deliver all of the installments of the note due and to make immediate and exclusive possession of the property. The execution of the note and chattel mortgage is conceded by plaintiff, and he asserts that the same are valid for the reason that the loan was made at a greater rate of interest than 7 per cent per annum; that the lender did not have a license to make such a loan, and that the transaction was in violation of the Small Loans Act, Gen. St. (Chap. 11). This act provides in substance that it shall be unlawful to make any loan of money in the amount of \$100 or more and charge an interest for or receive a greater rate of interest than 7 per cent per annum without first obtaining a license from the Department of Trade and Commerce, and that such license shall be kept in a conspicuous position in the place of business of the licensee. Testimony was also given that plaintiff negotiated with both Mr. Johnson and Mr. Berkoff

in the office of the North Shore Discount Company with reference to the loan, offering as security his automobile; they agreed upon a loan to him of \$150 and a check for this amount was given to plaintiff who signed the note and chattel mortgage. Although the loan was \$150, the note plaintiff signed was for \$180, payable in ten monthly installments of \$18 each. It is manifest that this excess of \$30 over the amount actually loaned to plaintiff would be interest at the rate of about 30 per cent per annum - far in excess of the 7 per cent limit prescribed by the statute. Defendants in their reply brief for the first time attempt to meet this point, saying there is no evidence that this \$30 was for "commission or a charge," and say it was to cover the cost of insurance. There is some suggestion in the record that one of the defendants said something about insurance, but the record also tends to show that no insurance was placed on the car. In People v. Hickey, 291 Ill. 159, it was held that this statute covered a single transaction. See also Heming v. Peyer, 269 Ill. App. 152, and the recent opinion of this court in People v. Keres, No. 36492, filed April 10, 1933. The trial court properly held that under the statute the chattel mortgage and note were void. Para. 23, ch. 74 (Cahill.)

We agree with defendants' point that there was no evidence that the automobile was maliciously taken. In an action of trover a malicious taking may be alleged and must be proven. The present case was not tried upon that theory and there was no attempt to prove any exemplary damages. Furthermore, the case was one of the fourth class, tried by the court, and hence the case is whatever the evidence makes it, and this was a simple case of conversion. If the chattel mortgage had been valid, defendants would have been entitled to take possession.

In Price v. Bailey, 265 Ill. App. 356, it was held that the general finding in favor of plaintiff will be sustained although

the evidence may be insufficient to sustain a count of malicious and wilful wrong. See also Levy v. Schikowski, 239 Ill. App. 447.

The evidence shows that both Hayden and Perkell were concerned in taking the automobile. Mr. Perkell testified that he had the car taken and had sent plaintiff a report and notice of sale; he also made the loan to plaintiff and upon the trial offered to return the car to plaintiff upon receiving payment of the amount of the loan. The defendant Hayden admitted the car was in his possession and he was seen driving it.

Judgment was entered for \$400. Plaintiff testified that he had paid \$475 for the car and had rebuilt it, and that its market value because of this improvement was \$600 at the time it was taken. Plaintiff said that the complete car from end to end was rebuilt. Defendants introduced witnesses who testified without having seen the car, that its value would be about \$115 or from \$150 to \$165. The figure of \$400 awarded by the court may be somewhat high but it was within the scope of the testimony and we would not be justified in disturbing it.

We see no reason to reverse and the judgment is affirmed.

AFFIRMED.

Matchett and O'Conner, JJ., concur.

and other work. See also *Law & Economics*, 103 *Harv. L. Rev.* 1417 (1991).

The evidence shows that both Nathan and Kervell were concerned in taking the automobile, Mr. Kervell testified that he had the car taken and had some plaintiff's receipt and notice of sale; he also made the loan to plaintiff and upon the firm's failure to return the car to plaintiff upon receiving payment of the amount of the loan. The defendant Nathan admitted the car was in his

was within the range of the testimony and we would not be justified
The figure of \$400 awarded by the court may be somewhat high but it
may be, and the value would be about \$100 at that time in 1925.
Nationalists introduced witnesses who testified without having seen
The witness said that when complete car tires and so and was rebuilt.
value because of this improvement was \$600 at the time it was taken.
and said that the car was not used because it was not the matter
The witness was asked for 1925. The witness testified that the

1. 姓名: 李 明 2. 性别: 男 3. 年龄: 25 4. 籍贯: 湖南长沙 5. 职业: 教师 6. 学历: 本科 7. 学位: 硕士 8. 职称: 副教授 9. 工作单位: 湖南大学 10. 联系电话: 13808888888 11. 电子邮箱: liming@hnu.edu.cn 12. 联系地址: 湖南大学 13. 邮政编码: 410006 14. 身份证号: 430106199801010001 15. 银行卡号: 62284801010101010101 16. 支付宝账号: 12345678901234567890 17. 微信账号: 12345678901234567890 18. 手机号码: 13808888888 19. 电子邮箱: liming@hnu.edu.cn 20. 联系地址: 湖南大学 21. 邮政编码: 410006 22. 身份证号: 430106199801010001 23. 银行卡号: 62284801010101010101 24. 支付宝账号: 12345678901234567890 25. 微信账号: 12345678901234567890

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36361

PEOPLE OF THE STATE OF ILLINOIS
ex rel. Oscar Nelson as Auditor
of Public Accounts of the State
of Illinois,

vs.

STONY ISLAND STATE SAVINGS BANK,
a Corporation.

In the Matter of the Intervening
Petition of PATRICK and ANNA NOLAN,
Appellees,

vs.

IRWIN T. GILRUTH, as Receiver of
Stony Island State Savings Bank,
a Corporation,
Appellant.

APPEAL FROM SUPERIOR
COURT OF COOK COUNTY.

270 I.A. 625

MR. JUSTICE MATCHETT DELIVERED THE OPINION OF THE COURT.

This appeal is by the receiver of the Stony Island State Savings Bank from an order entered upon the intervening petition of Patrick and Anna Nolan on July 25, 1932.

The facts disclosed by the record appear to be as follows: On July 26, 1931, the Auditor of Public Accounts filed his bill for dissolution of the Stony Island State Savings Bank, a banking corporation organized under the laws of Illinois. Irwin T. Gilruth was appointed receiver. On February 26, 1932, the Nolans, husband and wife, filed an amended and supplemental petition praying that a deposit of \$2500 made by them in the bank should be declared to be a preferred claim, and that the receiver should be required to pay that amount to them. The receiver answered stating that he was without knowledge as to the facts alleged, but denying the petitioners were entitled to the relief prayed and asking that the claim be allowed as a general claim.

The chancellor heard the evidence offered by petitioners (no evidence having been offered in behalf of the receiver) and

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IN THE MATTER OF THE INTERVIEWING
OFFICE OF PATRICK AND ANNA BOLAN,
Appellants.

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FORM NO. 10 (REV. 12-1-79) USE PREVIOUS EDITIONS UNLESS NOTED

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politics and economics are very closely related and are both essential for the development of a country.

At Walter and Anna's home on July 22, 1932.

The facts disclosed by the report appear to be as follows:

On July 30, 1941, the Auditor of Public Accounts filed with the

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On February 26, 1952, the following information was received:

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Deposits of \$2500 made by them in the bank should be disbursed to be

A great many elements, and that the receiver should be regulated to say

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without knowledge as to the facts alleged, but denying the same.

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(The witness having been sworn in behalf of the receiver) and

entered a decree finding that on June 9, 1931, the bank wholly ceased doing business; that the Auditor of Public Accounts took charge of the bank and on July 10th appointed Gilruth receiver; and "that the petitioners herein, Patrick Nolan and Anna Nolan did, on the 8th day of June, at about 1:30 o'clock in the afternoon, deposit in a savings account, in the said Stony Island State Savings Bank, the sum of \$2,500.00; that the said deposit consisted of currency and that the denominations thereof were two \$1,000.00 bills and five \$100.00 bills; that said deposit was made to one Robert Bain, who was the cashier and one of the directors of said bank and that at the time of said deposit a conversation was had by the petitioners herein with said Robert Bain, the contents of which was as follows: Anna Nolan: 'Are you sure that your bank is safe and that our money will be kept for us securely and returned at any time that we may need it?' Mr. Bain - responding: 'Yes, Mrs. Nolan, ours is a safe bank and you need have no fears to leave your money with us.'" The decree further found that relying on these statements as made by Robert Bain, petitioners deposited their money; that the next morning, June 9, 1931, at about 10:30 a. m., the Stony Island State Savings Bank ceased doing business; that at the time the Auditor of Public Accounts took charge of the bank on the morning of June 9th there was cash on hand in the sum of \$28,189.51; that at the time the deposit was received the bank was insolvent and had been for some time previously; that Robert Bain was an officer of the bank and knew that the bank was insolvent at that time, and that the receipt of the deposit by him was a fraud upon petitioners.

The decree further found "that by reason of the foregoing and the fraud exercised upon the petitioners herein, a trust was raised ex malaficio in favor of the petitioners herein in the sum of \$2,500.00 and that Irwin T. Gilruth, receiver herein, is now

...the bank was ...
...the Auditor of Public Accounts took ...
...of the bank and on July 10th ...
...the ...
...at about 11:30 o'clock in the afternoon, the-
...in a savings account, in the said Henry Island State Savings
...the sum of \$2,500.00; that the said deposit consisted of cur-
...the ...
...and five \$100.00 bills; that said deposit was made to one Robert
...was the cashier and one of the directors of said bank and
...that at the time of said deposit a conversation was had by the
...the contents of which
...was as follows: 'Now Robert: 'Are you sure that your bank is safe
...and that our money will be kept for us securely and returned at
...any time that we may need it?' 'Mr. Hale - responding: 'Yes, Sir.
...Robert, ours is a safe bank and you need have no fears as to your
...money with us.' The doctor further found that relying on these
...statements as made by Robert Hale, the petitioner deposited said
...money; that the next morning, June 9, 1901, at about 10:30 a. m.,
...the Henry Island State Savings Bank ceased doing business; that
...at the time the Auditor of Public Accounts took charge of the bank
...on the morning of June 9th there was cash on hand in the sum of
...\$25,120.41; that at the time the deposit was received the bank
...was insolvent and had been for some time previously; that Robert
...Hale was an officer of the bank and knew that the bank was in-
...solvent at that time, and that the receipt of the deposit by him
...was a fraud upon the petitioner.

The doctor further found "that by reason of the foregoing
...and the fraud practiced upon the petitioner herein, a fraud was
...raised by said Hale in favor of the petitioner herein in the sum
...of \$2,500.00 and that said T. Gilman, receiver herein, is now

acting as trustee for the benefit of the petitioners, Patrick Nolan and Anna Nolan, holding the sum of \$2,500.00 as said trustee for the exclusive use and benefit of said Patrick and Anna Nolan."

It was therefore ordered by the decree, "that the claim of the said petitioners Patrick Nolan and Anna Nolan, in the sum of \$2,500.00, be and the same is hereby allowed as a preferred claim and that said claimants are entitled to preference and priority of payment by said Irwin T. Gilruth, receiver for said defendant, Stony Island State Savings Bank, provided that upon the distribution of the assets of said bank it is determined that there were in the possession of the said defendant bank, at the time of the closing of said bank, and that there came into the hands of the said receiver, among the assets of the said defendant bank, certain assets subject to the payment of preferred claims, ahead of and not subject to the claims of general creditors, and that the moneys of said petitioners, or any part thereof, are a part of the said assets and should be paid therefrom."

The decree further ordered that the questions of whether there were such assets in the possession of the defendant bank at the time of the closing thereof, or whether such assets came into the possession of the receiver, and if so, whether petitioners had an interest therein as against the claims of other preferred creditors, should be, and the same were reserved for future determination at a time to be thereafter fixed by the court, and that the court retained jurisdiction for the purpose of such determination. The decree directed that in the event no assets should be found in the hands of the receiver upon distribution which should be subject to be applied to the payment of the claim, or any part thereof, as preferred, then the claim, or any part thereof, so remaining unpaid, should stand allowed as a general claim against the estate of the bank in the sum of \$2500, or of

acting as trustee for the benefit of the petitioners, Nathan Holm
and Anna Holm, holding the sum of \$2,000.00 as said trustee for
the exclusive use and benefit of said Nathan and Anna Holm.
It was therefore ordered by the court, "That the claim of
the said petitioners Nathan Holm and Anna Holm, in the sum of
\$2,000.00, be and the same is hereby allowed as a preferred claim
and that said claimants are entitled to preference and priority of
payment by said Lewis E. Gilman, receiver for said delinquent,
Stony Island State Savings Bank, provided that upon the distribu-
tion of the assets of said bank it is determined that there were
in the possession of the said delinquent bank, at the time of the
closing of said bank, and that there came into the hands of the
said receiver, among the assets of the said delinquent bank, certain
assets subject to the payment of preferred claims, whereof it was not
subject to the claims of general creditors, and that the money of
said petitioners, or any part thereof, was a part of the said as-
sets and should be paid therefrom."
The court further ordered that the petitioners of record
there were such assets in the possession of the delinquent bank at
the time of the closing thereof, or whether such assets came into
the possession of the receiver, and if so, whether said petitioners had
an interest therein as against the claims of other preferred
creditors, should be, and the same were reserved for their de-
termination at a time to be thereafter fixed by the court, and
that the court retained jurisdiction for the purpose of such de-
termination. The judge directed that in the event no assets
should be found in the hands of the receiver upon distribution
which should be subject to be applied to the payment of the claim,
or any part thereof, as preferred, then the claim, or any part
thereof, so remaining unpaid, should stand allowed as a general
claim against the assets of the bank in the sum of \$2000, or of

such part thereof, as should not be so preferred in payment, and should be entitled to share with all general claims which should have been allowed against the estate of the bank in any and all dividends, which should upon distribution be ordered paid upon such general claims.

Petitioners have made a motion to dismiss the appeal for the reason that the decree appealed from is not final. They contend that the receipt of this deposit made under the circumstances as disclosed by the evidence amounted to a fraud upon them; that by reason thereof a constructive trust arose which a court of equity will enforce in favor of them, and that it was so held in the similar cases of People v. Michigan Avenue Bank, 242 Ill. App. 579; People v. American Trust & Savings Bank, 262 Ill. App. 456, and Streeter v. Gamble, 298 Ill. 332.

The receiver, on the other hand, contends that the evidence does not establish such fraud as would be sufficient to raise a constructive trust. We are inclined to the opinion that the evidence produced by petitioners (none having been offered in behalf of the receiver) is prima facie sufficient. However, it is unnecessary to decide that question for the reason that, contrary to our first impression and upon consideration of the whole case, we are compelled to conclude that the decree is not final and appealable and must be dismissed for that reason. The decree discloses that the Molans are found to have only a conditional preferred claim against the receiver, which, if the condition fails, is allowed only as a general claim. In other words, the court has not finally determined the res of the trust fund or the rights of these claimants to it. This court does not determine the rights of litigants piecemeal.

It is quite unnecessary to discuss at length the question of when an order or decree is final within the meaning of the statute.

that part thereof, as should not be so restricted in payment, and
should be subject to their will all general claims which
have been allowed against the estate of the bank in any and all
dividends, which should upon distribution be subject to the same
general claims.

Petitioners have made a motion to dismiss the appeal for
the reason that the decree appealed from is not final. They con-
tend that the receipt of this deposit made under the circumstances
as disclosed by the evidence amounted to a trust upon them; that
by reason thereof a constructive trust arose which a court of
equity will enforce in favor of them, and that it was so held in
the similar case of Trust v. National Business Bank, 202 Ill. App. 3d
570; Trust v. National Trust & Savings Bank, 202 Ill. App. 3d
571; Trust v. Bank, 202 Ill. App. 3d.

The answer, on the other hand, contends that the evidence
does not establish that there was any intention to create a con-
structive trust. We are inclined to the opinion that the evidence
produced by petitioners (none having been offered in behalf of the
receiver) is prima facie sufficient. However, it is unnecessary to
decide this question for the reason that, whether or not there is
question and upon consideration of the whole case, we are compelled
to conclude that the decree is not final and appealable and must be
affirmed for that reason. The decree dissolves the trust
and found to have only a conditional preferred claim against the
receiver, which, if the condition fails, is allowed only as a
general claim. In other words, the court has not finally determined
the rank of the trust fund as the rights of these claimants to it.
This court does not determine the rights of different claimants.
It is quite unnecessary to answer at length the question
of when an order or decree is final within the meaning of the statute.

It will be sufficient in that regard to cite Gray v. Ames, 220 Ill. 250, and People v. Illinois State Bank, 312 Ill. 613. In the last named case the court stated: "While this court has not decided the precise question presented, it has repeatedly held that a final decree is not necessarily the last order in a case, and that any order which finally fixes the rights of the parties is final and appealable." Hoier v. Kaplan, 313 Ill. 448, upon which the receiver relies, is not inconsistent with this view. The opinion in that case states: "The test is whether the decree or order appealed from determines the ultimate rights of the parties with respect to distinct matters which have no bearing on other matters left for further consideration."

This decree, it is apparent, does not determine the ultimate rights of the parties interested in the subject matter of the controversy. The appeal should not have been granted, and the motion of petitioners to dismiss it will be allowed.

APPEAL DISMISSED UPON MOTION OF APPELLATES.

McSurely, P. J., and O'Connor, J., concur.

It will be sufficient in that regard to cite Wright v. ...
121. 720, and Smith v. ... 121. 711. 12

the fact named case the court stated: "While this court has not

decided the precise question presented, it has repeatedly held

that a final decree is not necessarily the last order in a case,

and that any order which finally fixes the rights of the parties

is final and unreviewable." Moore v. ... 121. 711. 123, 124

When the respective parties, it was contended, with this view,

the parties in that case stated: "The test is whether the de-

cree or order appealed from determines the ultimate rights of the

parties with respect to the subject matter which was presented

to the court." Wright v. ... 121. 720. 123, 124

This doctrine, it is asserted, does not determine the

ultimate rights of the parties (presented in the subject matter of

the controversy. The appeal would not have been allowed, and the

motion of petitioners to dismiss it will be allowed.

REVEREND MEMBERS OF THE HOUSE OF REPRESENTATIVES.

February 2, 1911 and January 1, 1912.

36550

JAMES M. KENNEDY and OTTO VON
RAUTENKRANZ, Co-partners Trading
as Lake View Real Estate Exchange,
Appellants,

vs.

JOHN R. THOMPSON, Jr.,
Appellee.

727
APPEAL FROM MUNICIPAL
COURT OF CHICAGO.

270 I.A. 625²

MR. JUSTICE MATCHETT DELIVERS THE OPINION OF THE COURT.

This appeal is by plaintiffs from an order entered on November 21, 1932, nunc pro tunc as of November 19, 1932, granting the prayer of the second amended petition of defendant, praying that certain orders entered on June 16, 1932, and June 22, 1932, should be vacated and set aside.

The record shows that on December 14, 1931, plaintiffs brought suit filing a statement of claim for commissions claimed to have been earned in a real estate transaction. They filed a demand for trial by jury. Defendant appeared, filed an affidavit of merits and also demanded trial by jury, and the cause was placed on the jury calendar. On June 16, 1932, an order was entered which recited that by agreement of the parties the jury demand was withdrawn and the cause submitted to the court and continued until June 26th. On June 26th, in the absence of defendant and his counsel, an ex parte judgment was entered in favor of plaintiffs and against defendant for the sum of \$350.

The order from which plaintiffs appeal set aside the order entered June 16th and the judgment entered June 26th. The original motion to set aside these orders, with affidavit in support thereof, was filed August 5, 1932, - more than thirty days after the entry of the same. The proceeding was therefore under section 21 of the Municipal Court act. A petition praying

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OFFICE OF THE ATTORNEY GENERAL

JOHN A. THOMPSON, JR.
Solicitor General

280 I.A. 622

MR. JUSTICE RALPH BELMONT THE CHIEF OF THE COURT.

This report is by Plaintiff's from an order entered on
November 21, 1952, which was entered on November 19, 1952, granting
the request of the second amended petition of defendant, praying
that certain orders entered on June 16, 1952, and June 20, 1952,
should be vacated and set aside.

The record shows that on November 14, 1951, Plaintiff's
brought suit filing a statement of claim for compensation claimed
to have been earned in a coal mining transaction. They filed a
demand for trial by jury. Defendant appeared, filed an affidavit
of merits and also demanded trial by jury, and the cause was
placed on the jury calendar. On June 16, 1952, an order was en-
tered which resulted from by agreement of the parties the jury
demand was withdrawn and the cause submitted to the court and con-
tinued until June 20th. On June 20th, in the absence of defend-
ant and his counsel, an ex parte judgment was entered in favor of
Plaintiff and against defendant for the sum of \$1200.

The order from which Plaintiff's appeal was taken was
entered June 16th and the judgment entered June 20th. The
original motion to set aside the order, with affidavit in
support thereof, was filed August 5, 1952, - more than thirty
days after the entry of the same. The proceeding was therefore
taken under section 21 of the Municipal Court act. A petition praying

the same relief was filed by defendant October 24, 1932, and this was in turn superseded by a second amended petition filed by him October 31, 1932. The matter came on for hearing upon the second amended petition and the answer of plaintiffs thereto, and the court after hearing the evidence (which is preserved in the record) and a consideration of it, entered the order from which this appeal is taken.

The second amended petition recited the bringing of the suit and the filing of plaintiffs' statement for demand for jury and of the affidavit of merits with demand for jury; alleged that defendant's attorney answered the call of the case on different dates and was ready for trial; that the cause was continued on diverse dates because of the absence of various witnesses; that after June 3rd but before June 13th the Chief Justice of the Municipal court announced that the trial of regular jury cases would cease after June 10, 1932, and that all the cases then pending on all jury calendars, except those which were to be heard in room 1108, would go to the September jury calendar; that an announcement to that effect was published in the Daily Municipal Court Record; that Judge Melander, before whom the case was pending, announced that notwithstanding the general order jury cases would be heard in room 1106 for another week, until June 17th; that on June 13th defendant's attorney answered the call of this case in room 1106, stated defendant was ready but because of numerous cases which were ready and ahead of this case, it was continued to June 15th, that Robert Ets Bokin was an attorney associated with the law firm who were attorneys of record for defendant, that he was the attorney in charge of the defense, prepared and filed the pleadings, and appeared on each of the calls; that in the June 15th issue of the Municipal Court Record this case was on trial call in room 1106 under a list of cases entitled "non-jury cases," whereas in fact

The same relief was filed by defendant October 21, 1932, and this was in turn answered by a second amended petition filed by him October 21, 1932. The matter came on for hearing upon the second amended petition and the answer of plaintiff's thereto, and the court after hearing the evidence (which is presented in the record) and a consideration of it, entered the order from which this appeal is taken.

The second amended petition recited the bringing of the suit and the filing of plaintiff's statement for demand for jury and of the affidavit of service with demand for jury; alleged that defendant's attorney answered the call of the court on different date and was ready for trial; that the case was called on for trial because of the absence of various witnesses; that after the fact was set aside from the court's calendar of the calendar court announced that the trial of regular jury cases would occur after June 27, 1933, and that all the cases then pending on all July calendar, except those which were to be heard in room 1100, would go to the September jury calendar; that on announcement of this effect was published in the Daily Oklahoman Court Record; that this calendar, before when the case was pending, announced that notwithstanding the general order jury cases would be heard in room 1100 for another week, until June 17th; that on June 16th defendant's attorney answered the call of this case in room 1100, stating defendant was ready but because of numerous cases which were ready and need of this case, it was continued to June 18th, that Robert M. Mohr was an attorney associated with the law firm who were attorneys of record for defendant, that he was the attorney in charge of the defense, presented the first jury affidavit, and appeared on each of the calls; that in the June 18th issue of the Oklahoman Court Record this case was on trial call in room 1100 under a list of cases entitled "non-jury cases," whereas in fact

the cases then in room 1106 were jury cases; that on June 15th said Ets Hokin knew that he would be engaged before Judge Fairbank on the 16th from 9:30 a. m. until the close of court in the afternoon, except lunch time, on trial of the first case for trial in said court, entitled "Kaplan, Assignee, v. L. Fish Furniture Co.", and knew that it would therefore be impossible for him to try this case; that in order to prevent any default said Ets Hokin appeared in room 1106 prior to 9:30 a. m. on June 16th, told the minute clerk the case was a jury case, that he had to try the first case on Judge Fairbank's call and couldn't answer the call of the case or try it; that said clerk told him there were several other cases ahead of it that were ready and that all of them could not be heard in the two days left, and that since this case was seventh on the call and was a jury case, and could not because of the cases ready ahead of it be reached for trial before the closing of that branch for the summer, the case would not be called for trial on June 16th but would be automatically continued and placed on the September calendar; that after receiving and relying on the statement of the clerk, he went to Judge Fairbank's court and there remained engaged for the rest of the day, and did not return to room 1106; that relying on the information and assurances so given him by the minute clerk and on the defendant's jury demand, he did not thereafter consult the record of the case as to the disposition made thereof on said date, it being his intention to consult the September jury calendar; that neither defendant nor his attorneys heard anything more about this case until defendant was on August 1, 1932, served with execution, and that his attorneys then examined the records and learned of the entry of the order of June 16th reciting that by agreement the jury demand was withdrawn and the case submitted to the court and continued to June 28th, when the court sitting without a jury entered

The case then in room 1108 were jury cases; that on June 18th
said Mr. Kohn knew that he would be engaged before Judge Fair-
bank on the 18th from 9:30 a. m. until the close of court in the
afternoon, except lunch time, on trial of the first case for
trial in said court, entitled "English, William, et al. vs. The
Life Co.", and knew that it would therefore be impossible for
him to try this case; that in order to prevent any delay in
Mr. Kohn appeared in room 1108 prior to 9:30 a. m. on June 18th,
told the minute clerk the case was a jury case, that he had to try
the first case on Judge Fairbank's call and couldn't answer the
call of the case at 9:30; that said clerk told him there were
several other cases ahead of it that were ready and that all of
them could not be heard in the two days left, and that since this
case was seventh on the call and was a jury case, and could not
because of the cases ready ahead of it be reached for trial he
told the clerk of that branch for the moment, the case would not
be called for trial on June 18th but would be automatically con-
tinued and placed on the September calendar; that after receiving
and relying on the statement of the clerk, he went to Judge Fair-
bank's court and there remained engaged for the rest of the day,
and did not return to room 1108; that relying on the information
and assurances so given him by the minute clerk and on the de-
fendant's jury demand, he did not thereafter consult the record of
the case as to the disposition made thereon on said date, it
being his intention to consult the September jury calendar; that
before returning to his attorney's office he telephoned said minute
clerk and testified that he asked if, after having this conversation,
and that his attorney then advised him to return and remain at the
court of the order of June 18th reciting that by agreement the jury
demand was withdrawn and the case scheduled to the court and con-
tinued to June 18th, when the court sitting without a jury ordered

a finding and judgment for \$350.

The petition averred that neither defendant's attorneys of record, nor any attorney of said firm, nor defendant, nor any person having authority to do so, appeared in room 1106 on June 16th, or at any other time or place, and waived or withdrew, or consented or agreed to waive or withdraw defendant's jury demand; ^{at} that ~~no~~ time had defendant or his attorneys or anyone authorized by defendant, withdrawn or waived defendant's jury demand; that without authority of defendant or his attorneys, some person or persons unknown to defendant or his attorneys and not authorized, appeared before the court in room 1106 on June 16th, and by fraud, accident or mistake, falsely represented to the court that they were the defendant or his attorney, and that defendant waived his jury demand, and procured the entry of the order; that the court did not know the representations were false, without authority, etc.; that as a result of the false representations so made to the court and the procuring by fraud, accident or mistake of the entry of the order on June 16th, the court was induced to hear said cause on June 28th without a jury and to enter an ex parte judgment; that on June 28th the court was without knowledge of the fact that the hearing was being held without knowledge or consent of defendant or his attorneys; that the jury demand had been wrongfully withdrawn, that if the court had had knowledge that the order of June 16th was procured by false representations, he would not have entered it nor would he have entered an ex parte judgment on June 28th; that since neither defendant nor his attorneys nor anyone authorized appeared and waived the jury demand, the order of June 16th was clearly erroneous, but the only proper order was one impanelling a jury and trying the issues, or one continuing the case to the next jury calendar; that neither plaintiffs nor their attorney ever informed defendant or his attorneys the case would be

The petition averred that William Belmont's attorney of record, not any attorney of said firm, not Belmont, nor any person having authority to do so, appeared in room 1108 on June 18th, or at any other time or place, and waived or withdrew, consented or agreed to waive or withdraw Belmont's jury demand; that the firm had Belmont or his attorney or anyone authorized by Belmont, withdraw or waive Belmont's jury demand; that without authority of Belmont or his attorney, some person or persons unknown to Belmont or his attorney and not authorized, appeared before the court in room 1108 on June 18th, and by threat, coercion or mistake, falsely represented to the court that they were the Belmont or his attorney, and that defendant waived his jury demand, and procured the entry of the order; that the court did not know the representations were false, without malice, etc.; that as a result of the false representations made to the court and the pressure of threat, coercion or abuse of the court of the order on June 18th, the court was induced to make said order on June 18th without a jury and to enter an ex parte judgment; that on June 18th the court was without knowledge of the fact that the hearing was being held without knowledge or consent of Belmont or his attorney; that the jury demand had been expressly withdrawn, that if the court had had knowledge that the order of June 18th was procured by false representations, he would not have entered it nor would he have entered an ex parte judgment on June 18th; that since neither Belmont nor his attorney nor anyone authorized appeared and waived the jury demand, the order of June 18th was directly erroneous, but the only proper order was one dismissing a jury and setting the issue, or the equivalent, and the court the next day ordered; that neither Belmont's nor their attorney ever informed Belmont or his attorney the same would be

called June 28th, although they were aware they were ready, able and willing to proceed with the trial of the case; that neither defendant nor his attorneys were in court on June 28th or had notice or knowledge that the case was on the call on that date, or that the case was then called and an ex parte finding and judgment entered, until execution was served on defendant, and that defendant therefore had no opportunity to appear and move to vacate the order of June 16th; that since, without knowledge or consent of defendant or his attorneys, said person or persons unknown, appeared before the court on June 16th, and by fraud, accident or mistake falsely represented themselves to be the defendant or his attorney, and that defendant waived his jury demand, and so procured the entry of the order; and that since the court did not know that the representations were false and unauthorized and that defendant or his attorneys had not waived his jury demand, a fraud was practiced on the court and on defendant, as a result of which and without negligence, the court was induced to and did enter the ex parte judgment on June 28th, and that defendant was prevented from interposing his defense, from being present and objecting and excluding improper evidence, cross-examining witnesses, or having the case tried by a jury; that after June 28th neither plaintiffs nor their attorneys ever communicated with defendant or his attorneys to try to procure payment of the judgment without expense of issuing and serving execution, although they knew defendant was financially responsible; that because of such failure and the delay in having execution issued and served, defendant had no knowledge of the order of June 16th or judgment of June 28th until more than 30 days had passed, and so was unable to move to vacate same, pray an appeal, or procure bill of exceptions during the term, and so his remedy at law was lost except by this proceeding; that defendant and his attorneys have used due diligence and were entitled to rely and did rely on

called June 20th, although they were sworn they were ready, and willing to proceed with the trial of the case; that neither defendant nor his attorneys were in court on June 20th or had notice or knowledge that the case was on the call on that date, or that the case was then called and on the 21st finding and judgment entered, until exception was served on defendant, and that defendant therefore had no opportunity to appear and move to vacate the order of June 21st; that since, without knowledge or consent of defendant or his attorney, said notice or process was served, entered and the court on June 21st, and by reason, accident or mistake therein represented themselves to be the defendant or his attorney, and that defendant waived his jury demand, and he presented the entry of the order; and that since the court did not know that the representation were false and unauthorized and that defendant or his attorney had not waived his jury demand, a finding was pronounced on the merits and on defendant, as a result of which and without negligence, the court was induced to set the case on the 22nd of June 21st, and that defendant was prevented from introducing his defense, from being present and objecting and conducting his testimony, cross-examining witnesses, or having the case tried by a jury; that after June 20th neither plaintiff nor their attorneys were communicated with defendant or his attorneys to try to procure payment of the judgment without expense of looking and serving execution, although they were defendant and (necessarily) plaintiff; that because of such failure and the delay in having execution issued and served, defendant had no knowledge of the order of June 21st or judgment of June 21st until after June 22nd and beyond, and as the parties to move to vacate same, they so agreed, or otherwise all of exceptions during the term, and as his remedy as law was lost except by this proceeding; that defendant and his attorneys have used due diligence and were entitled to rely and act only on

statements of the minute clerk that the case could not be heard before adjournment for the summer because of large number of cases ahead of it, and it would be automatically continued to the September jury calendar; and also upon the facts that defendant had filed a jury demand and it had not been waived, that no jury trial of the case having been had prior to June 16th, and since the clerk said it would be placed on the September jury calendar, they need not watch it or consult the records until September, and that they could assume that no person would improperly appear and falsely represent to the court that defendant waived his jury demand; and therefore defendant and his attorneys did not consult the records.

Defendant also averred that he had a meritorious defense to plaintiff's demand as set forth in the affidavit of merits, which was set up in detail but which it is not necessary to recite at length.

The prayer of the petition was that plaintiff's might be required to answer, the ex parte judgment vacated, the order of June 16th vacated and expunged, and plaintiff's enjoined from enforcing the judgment.

Plaintiff's answered admitting the proceedings up to June 13th, and that the cause on that date was upon the regular jury call, which, however, had been discontinued pursuant to a general rule entered by the Chief Justice; that the jury trials, however, were being continued in the room of Judge Helander before whom the case was pending for another week. Plaintiff's averred that on that date attorney for defendant appeared in court and requested a further continuance because of an absent witness; that the trial Judge then stated that if the continuance was granted there was small likelihood of the case being heard as a jury case; that

statement of the minute clerk that the case could not be heard before adjustment for the summer because of large number of cases ahead of it, and it would be automatically continued in the September jury calendar; and also upon the facts that defendant had filed a jury demand and it had not been waived, that on July trial of the case having been had prior to June 18th, and also the clerk said it would be placed on the September jury calendar, they need not watch it or counsel the records until September, and that they would assume that no person would lawfully appear and testify in person to the court that defendant waived his jury demand; and therefore defendant and his attorneys did not counsel

the parties.

Defendant also averred that he had a written demand to plaintiff's demand as set forth in the affidavit of service, which was set up in detail but which it is not necessary to set out at length.

The prayer of the petition was that plaintiff might be required to answer, the SA RALPH HUGHES testified, the order of June 18th was issued and answered, and plaintiff's motion from the court for judgment.

Plaintiff requested that the proceedings be in the fall, and that the court on that date was upon the regular jury call, which, however, was then discontinued pursuant to a general rule entered by the trial court; and the jury venire, however, were being continued in the town of Judge Palmer before whom the case was pending for another week. Plaintiff wanted that on that date attorney for defendant appeared in court and requested a further continuance because of an absent witness; and the trial judge then stated that at the conclusion was turned over

was would be held at the same place held on a jury case; that

the attorney for defendant then stated that if the case might be continued to June 16th and if it appeared at that time that a jury trial could not be had he would waive the jury and submit the case to the court; that it was his jury demand; that thereupon the case was continued to June 16th.

The answer denied that any person or persons appeared on June 16th falsely representing to be the defendant or his attorney and waiving the jury demand, but on the contrary stated that the duly authorized attorney of defendant appeared before the court in room 1106 on June 16, 1932, and waived and withdrew the jury demand; that on that date, after the opening of the court and upon the regular call of the case in its turn, attorney for defendant responded and stated to the court that he was engaged or about to become engaged before another judge and could not try the case; that the jury demand was a joint demand; that defendant would waive it and understood plaintiffs would also; that the court instructed plaintiffs to wait and the attorney for defendant to make sure his other case was actually going to trial; that thereafter on said date, it having been determined that defendant's attorney was actually engaged and the jury demand having been waived by both parties in open court, the order was entered and the case continued to June 20th for hearing before the court, at which time the ex parte judgment was entered.

The cause was heard by the court upon the issues as thus made up, and at the conclusion of the evidence the order appealed from was entered.

The proceeding involves a construction of section 21 of the Municipal Court act (Smith-Hurd's Ill. Rev. Stats. 1931, chap. 37, sec. 21, p. 946) which provides that every judgment, order or decree of the Municipal court final in its nature shall be subject to be vacated, set aside or modified in the same manner and to the

the attorney for defendant then stated that if the case might be continued to June 10th and if it appeared at that time that a jury trial could not be had he would waive the jury and submit the case to the court; that is was his last demand; that throughout the case was continued to June 10th.

The above named individual, who was present at the hearing, stated that he was not present at the hearing and that he was not present at the hearing and that he was not present at the hearing.

[illegible]

The preceding levels are a continuation of section 11.1. The following levels are (1) 11.1.1, 11.1.2, 11.1.3, 11.1.4, 11.1.5, 11.1.6, 11.1.7, 11.1.8, 11.1.9, 11.1.10, 11.1.11, 11.1.12, 11.1.13, 11.1.14, 11.1.15, 11.1.16, 11.1.17, 11.1.18, 11.1.19, 11.1.20, 11.1.21, 11.1.22, 11.1.23, 11.1.24, 11.1.25, 11.1.26, 11.1.27, 11.1.28, 11.1.29, 11.1.30, 11.1.31, 11.1.32, 11.1.33, 11.1.34, 11.1.35, 11.1.36, 11.1.37, 11.1.38, 11.1.39, 11.1.40, 11.1.41, 11.1.42, 11.1.43, 11.1.44, 11.1.45, 11.1.46, 11.1.47, 11.1.48, 11.1.49, 11.1.50, 11.1.51, 11.1.52, 11.1.53, 11.1.54, 11.1.55, 11.1.56, 11.1.57, 11.1.58, 11.1.59, 11.1.60, 11.1.61, 11.1.62, 11.1.63, 11.1.64, 11.1.65, 11.1.66, 11.1.67, 11.1.68, 11.1.69, 11.1.70, 11.1.71, 11.1.72, 11.1.73, 11.1.74, 11.1.75, 11.1.76, 11.1.77, 11.1.78, 11.1.79, 11.1.80, 11.1.81, 11.1.82, 11.1.83, 11.1.84, 11.1.85, 11.1.86, 11.1.87, 11.1.88, 11.1.89, 11.1.90, 11.1.91, 11.1.92, 11.1.93, 11.1.94, 11.1.95, 11.1.96, 11.1.97, 11.1.98, 11.1.99, 11.1.100, 11.1.101, 11.1.102, 11.1.103, 11.1.104, 11.1.105, 11.1.106, 11.1.107, 11.1.108, 11.1.109, 11.1.110, 11.1.111, 11.1.112, 11.1.113, 11.1.114, 11.1.115, 11.1.116, 11.1.117, 11.1.118, 11.1.119, 11.1.120, 11.1.121, 11.1.122, 11.1.123, 11.1.124, 11.1.125, 11.1.126, 11.1.127, 11.1.128, 11.1.129, 11.1.130, 11.1.131, 11.1.132, 11.1.133, 11.1.134, 11.1.135, 11.1.136, 11.1.137, 11.1.138, 11.1.139, 11.1.140, 11.1.141, 11.1.142, 11.1.143, 11.1.144, 11.1.145, 11.1.146, 11.1.147, 11.1.148, 11.1.149, 11.1.150, 11.1.151, 11.1.152, 11.1.153, 11.1.154, 11.1.155, 11.1.156, 11.1.157, 11.1.158, 11.1.159, 11.1.160, 11.1.161, 11.1.162, 11.1.163, 11.1.164, 11.1.165, 11.1.166, 11.1.167, 11.1.168, 11.1.169, 11.1.170, 11.1.171, 11.1.172, 11.1.173, 11.1.174, 11.1.175, 11.1.176, 11.1.177, 11.1.178, 11.1.179, 11.1.180, 11.1.181, 11.1.182, 11.1.183, 11.1.184, 11.1.185, 11.1.186, 11.1.187, 11.1.188, 11.1.189, 11.1.190, 11.1.191, 11.1.192, 11.1.193, 11.1.194, 11.1.195, 11.1.196, 11.1.197, 11.1.198, 11.1.199, 11.1.200, 11.1.201, 11.1.202, 11.1.203, 11.1.204, 11.1.205, 11.1.206, 11.1.207, 11.1.208, 11.1.209, 11.1.210, 11.1.211, 11.1.212, 11.1.213, 11.1.214, 11.1.215, 11.1.216, 11.1.217, 11.1.218, 11.1.219, 11.1.220, 11.1.221, 11.1.222, 11.1.223, 11.1.224, 11.1.225, 11.1.226, 11.1.227, 11.1.228, 11.1.229, 11.1.230, 11.1.231, 11.1.232, 11.1.233, 11.1.234, 11.1.235, 11.1.236, 11.1.237, 11.1.238, 11.1.239, 11.1.240, 11.1.241, 11.1.242, 11.1.243, 11.1.244, 11.1.245, 11.1.246, 11.1.247, 11.1.248, 11.1.249, 11.1.250, 11.1.251, 11.1.252, 11.1.253, 11.1.254, 11.1.255, 11.1.256, 11.1.257, 11.1.258, 11.1.259, 11.1.260, 11.1.261, 11.1.262, 11.1.263, 11.1.264, 11.1.265, 11.1.266, 11.1.267, 11.1.268, 11.1.269, 11.1.270, 11.1.271, 11.1.272, 11.1.273, 11.1.274, 11.1.275, 11.1.276, 11.1.277, 11.1.278, 11.1.279, 11.1.280, 11.1.281, 11.1.282, 11.1.283, 11.1.284, 11.1.285, 11.1.286, 11.1.287, 11.1.288, 11.1.289, 11.1.290, 11.1.291, 11.1.292, 11.1.293, 11.1.294, 11.1.295, 11.1.296, 11.1.297, 11.1.298, 11.1.299, 11.1.300, 11.1.301, 11.1.302, 11.1.303, 11.1.304, 11.1.305, 11.1.306, 11.1.307, 11.1.308, 11.1.309, 11.1.310, 11.1.311, 11.1.312, 11.1.313, 11.1.314, 11.1.315, 11.1.316, 11.1.317, 11.1.318, 11.1.319, 11.1.320, 11.1.321, 11.1.322, 11.1.323, 11.1.324, 11.1.325, 11.1.326, 11.1.327, 11.1.328, 11.1.329, 11.1.330, 11.1.331, 11.1.332, 11.1.333, 11.1.334, 11.1.335, 11.1.336, 11.1.337, 11.1.338, 11.1.339, 11.1.340, 11.1.341, 11.1.342, 11.1.343, 11.1.344, 11.1.345, 11.1.346, 11.1.347, 11.1.348, 11.1.349, 11.1.350, 11.1.351, 11.1.352, 11.1.353, 11.1.354, 11.1.355, 11.1.356, 11.1.357, 11.1.358, 11.1.359, 11.1.360, 11.1.361, 11.1.362, 11.1.363, 11.1.364, 11.1.365, 11.1.366, 11.1.367, 11.1.368, 11.1.369, 11.1.370, 11.1.371, 11.1.372, 11.1.373, 11.1.374, 11.1.375, 11.1.376, 11.1.377, 11.1.378, 11.1.379, 11.1.380, 11.1.381, 11.1.382, 11.1.383, 11.1.384, 11.1.385, 11.1.386, 11.1.387, 11.1.388, 11.1.389, 11.1.390, 11.1.391, 11.1.392, 11.1.393, 11.1.394, 11.1.395, 11.1.396, 11.1.397, 11.1.398, 11.1.399, 11.1.400, 11.1.401, 11.1.402, 11.1.403, 11.1.404, 11.1.405, 11.1.406, 11.1.407, 11.1.408, 11.1.409, 11.1.410, 11.1.411, 11.1.412, 11.1.413, 11.1.414, 11.1.415, 11.1.416, 11.1.417, 11.1.418, 1

same extent as a judgment, order or decree of a circuit court during the term at which the same was rendered in such Circuit court, provided a motion to vacate, set aside or modify the same be entered in the Municipal court within thirty days after the entry of such judgment, order or decree; that if no motion to vacate, set aside or modify such judgment, order or decree shall be entered within thirty days after the entry of the judgment, order or decree, the same shall not be vacated, set aside or modified excepting upon appeal or writ of error, "or by a bill in equity, or by a petition to said Municipal court setting forth grounds for vacating, setting aside or modifying the same, which would be sufficient to cause the same to be vacated, set aside or modified by a bill in equity; Provided, however, that all errors in fact in the proceedings in such case, which might have been corrected at common law by the writ of error coram nobis may be corrected by motion, or the judgment may be set aside in the manner provided by law for similar cases in the circuit courts."

This section of the statute has been often construed by this court and by the Supreme court, and it has been held that a judgment order or decree of the Municipal court shall become final and conclusive after thirty days from the entry thereof; that after that time it may be set aside or modified only (1) by appeal or writ of error, (2) by a bill in equity, (3) by a petition to the Municipal court in substance the equivalent of a bill in equity, (4) by a motion analogous to that provided for by section 89 of the Practice act, and (5) in any manner provided by law for similar cases in the Circuit court.

The proceeding here, at least in its final phase, was by petition in the nature of a bill in equity. The brief of plaintiffs seems to be based upon the theory that the proceeding was similar to that under section 89 of the Practice act, and it points out

same extent as a judgment, order or decree of a circuit court duly entered in the records of such circuit court, and the term at which the same was rendered in such circuit court, provided a motion to vacate, set aside or modify the same be entered in the Municipal court within thirty days after the entry of such judgment, order or decree; that if no motion to vacate, set aside or modify such judgment, order or decree shall be entered within thirty days after the entry of the judgment, order or decree, the same shall not be vacated, set aside or modified excepting upon appeal or writ of error, "or by a bill in equity, or by a petition to said Municipal court setting forth grounds for vacating, setting aside or modifying the same, which would be sufficient to cause the same to be vacated, set aside or modified by a bill in equity; provided, however, that all errors in fact in the proceedings in such case, which might have been corrected at common law by the writ of error coram nobis may be corrected by motion, or the judgment may be set aside in the manner provided by law for similar cases in the circuit courts."

This section of the statute has been often construed by this court and by the Supreme court, and it has been held that a judgment order or decree of the Municipal court shall become final and conclusive after thirty days from the entry thereof; that after that time it may be set aside or modified only (1) by appeal or writ of error, (2) by a bill in equity, (3) by a petition to the Municipal court in substance the equivalent of a bill in equity, (4) by a motion analogous to that provided for by section 39 of the Practice act, and (5) in any manner provided by law for similar cases in the circuit courts.

The proceeding here, at least in the final phase, was by petition in the nature of a bill in equity. The writ of habeas corpus seems to be based upon the theory that the proceeding was similar to that under section 39 of the Practice act, and its policy was

certain errors from that standpoint. The proceeding by analogy to section 89 of the Practice act is essentially different from the proceeding by petition. A motion under section 89 is not addressed to the equitable powers of the court. It is purely and solely a proceeding at law and not in equity. Consolidated Coal Co. v. Geltien, 189 Ill. 85; Loew v. Krauss, 320 Ill. 244; Coultrey v. Yellow Cab Co., 258 Ill. App. 443. It is the usual practice to hear a motion of that kind on affidavits and counter-affidavits. Shanahan v. Stefenson, 139 Ill. 426; Consolidated Coal Co. v. Geltien, 189 Ill. 85; Domitaki v. American Linseed Co., 291 Ill. 161; Clark v. Daniel Hayes Co., 315 Ill. App. 350. Such a motion may be amended, however, so as to stand as a petition under this section. Iroquois Furnace Co. v. Wilkin Mfg. Co., 181 Ill. 582; Taylor Coal Co. v. Industrial Comm., 301 Ill. 381; Finlen v. Shelly, 310 Ill. 170.

We have held that the proceeding by petition under section 21 confers on the Municipal court of Chicago such power to vacate, set aside or modify the judgments of that court as a court of equity could exercise in a similar case under analogous proceedings. Imbria v. Bear, 230 Ill. App. 155; Izzi v. Lalonde, 246 Ill. App. 90; Walley v. Klein, 257 Ill. App. 171; Finlen v. Shelly, 310 Ill. 170. The pleadings and the proceedings here were in substance similar to those in equity, and the record must be reviewed from that standpoint. The rule in equity with reference to the modification or setting aside of a judgment by a court of law after the expiration of the term at which it was entered, is well settled by the cases. It is that a diligent defendant, who, without negligence or fraud on his part, has been prevented by fraud, accident or mistake from presenting a good and meritorious defense to a cause of action, may have the judgment entered against him set

aside upon application and proof of such facts to a court of equity. Owens v. Hanstead, 22 Ill. 161; How v. Martell, 28 Ill. 478; Bardonski v. Bardonski, 144 Ill. 284; Finlen v. Skelly, 310 Ill. 170; Izzi v. Galongo, 248 Ill. App. 90.

The controlling question in this case, as we view it, is whether the order entered by the court is clearly and manifestly against the evidence. Defendant cites authorities to the proposition that the motion under section 81, like that under section 89 of the Practice act, cannot be used to contradict the record. We do not question that proposition as applicable to a proceeding by way of motion under section 89 or as analogous to it, but as already stated this proceeding, at least in its final phase, was not of that character.

Moreover, there is no attempt here to contradict the record. There is no dispute as to what the record shows or as to what the record is, but it is contended that the orders which were undoubtedly made were entered through mistake and accident and, indeed, defendant's petition alleges that these orders were fraudulently obtained. We do not think the evidence would justify a finding of fraud, but apparently the trial Judge concluded that in the exercise of the chancery powers granted by the statute, under the evidence he could reasonably find that defendant in good faith intended to interpose a defense to the claim of plaintiffs and was prevented through inadvertence, accident or mistake from presenting it.

We have given attention to the evidence of the parties with reference to these issues. There is conflict as to what occurred. Plaintiff Kennedy, who was present on June 16th, says that defendant's attorney, Ets Hokin, told the court that he would waive the jury. A Mr. Weisgerber, who was present as a witness for plaintiffs, says that the attorneys for defendant told the court they

had a case before another judge that would come up for trial. The witness says that he could not give the exact conversation but that the Judge said he would wait to see how it stood; and, "That is all I can recall. There was talk about waiving the jury demand on both the 15th and the 16th. On the 16th something was said that they would be ready and would waive the jury provided it could not be heard by a jury. I believe it was Ets Hokin who said it."

The attorney for plaintiffs testified that defendant requested the case be set for June 16th; that the court stated he had a number of specially set cases that would occupy almost all the time left, and that if the case went over to June 16th there was small likelihood of its being heard as a jury case; that attorney for defendant stated in response that if it might be set for June 16th and if it appeared then it could not be heard as a jury case, defendant would waive the jury, and that the case was thereupon continued to June 16th. He further says that on June 16th he went into court, saw one of the plaintiffs, Mr. Kennedy, and Mr. Weisgerber, and that Kennedy stated he had answered the call "and Ets Hokin had answered and had stated that it was a joint ^{jury} demand and defendant had waived the jury, understood the plaintiffs were willing to waive it;" that he went to Judge Fairbank's court where he found plaintiff seated at the table, with the jury in the box, but no witness on the stand. He further testified: "I said to Ets Hokin, 'I see you are tied up here -- probably for all day?' He said 'Yes.' I said, 'Well, we certainly can't try the Kennedy case.' He said, 'No.' I said, 'There is no need of my staying around there then. We will just have to get another date.' He said, 'Yes, any date that is agreeable to the Court will be satisfactory to me.'" The witness further stated that he went back to room 1106 and asked the clerk to have the case called again; that it was called in a few minutes, at which time he stated to the court that he had found Ets Hokin was defi-

The had a case between another judge who would come up for trial. The witness says that he would not give the exact conversation but that the judge said he would wait to see how it stood; and, "What is all I can recall. There was talk about waiting the jury down on both the 18th and the 19th. On the 18th something was said that they could be ready and would waive the jury provided it could not be heard by a jury. I believe it was Mr. McKim who said it."

The attorney for plaintiff testified that defendant requested the case be set for June 18th; that the court stated he had a number of questions not covered that would occupy almost all the time left, and that if the case went over to June 18th there was small likelihood of its being heard on a jury case; that attorney further testified stated in response that it is might be set for June 18th and it is supposed that it will not be heard on a jury case.

Defendant's lawyer waived the jury, and the case was transferred from June 18th. He further says that on June 18th he went into court, one one of the plaintiffs, Mr. Kennedy, and Mr. Wolgerstedt, and that Kennedy stated he had answered the call "and Mr. McKim had answered and had stated that it was a legal demand and defendant had waived the jury, understood the plaintiff were willing to waive it; that he was in Judge Tolson's courtroom on June 18th; seated at the table, with the jury in the box, but no witnesses on the stand. He further testified: "I said to Mr. McKim, 'I see you are tied up here -- probably for all day?' He said 'Yes,' I said, 'Well, we certainly can't try the Kennedy case.' He said, 'No.' I said, 'There is no need of my staying around here. We will just have to get another case.' He said, 'Yes, my date that is applicable to the Court will be satisfactory to me.'" The witness further stated that he went back to room 1106 and asked the clerk to have the case called again; that it was called in a few minutes, at which time he acted as the court that he had told Mr. McKim was deli-

nately engaged; that the court asked him if the plaintiff was willing to waive the jury in the case, and he said he was; that he had always been willing, and that the court said, "Well, we will just set it down for a day then for hearing without a jury;" that he (the witness) replied that was correct; that the court said, "June 28th" and instructed the clerk to continue the case for hearing before the court, "jury waived." On cross-examination this witness said that the attorney for defendant agreed on June 13th to waive the jury demand, but that "I never heard him actually waive it."

On the contrary, an associate of Mrs. Hokin testified that he was present on June 13th; that attorney for plaintiff's indicated he was willing to waive the jury; that Mrs. Hokin stated that was agreeable to him, "but he would have to confer with his client before he could waive it." This witness testified positively that he was not in the court room on June 16th. Robert Mrs. Hokin testified that he did not on June 13th absolutely agree to waive the jury but merely stated that he did not know of any reason why it could not be waived, although he would have to talk with defendant who had the final "say" in the matter. He said that on June 16th when in the court he did not see either Kennedy or Weisgerber and did not return to the courtroom that morning.

In a proceeding of this kind, where the judge who entered the order is also the judge hearing the petition, and where the court after hearing conflicting evidence makes a finding, we think a court of review should hesitate to find to the contrary, since the trial judge has most unusual advantages in weighing the evidence. We can not say that the finding of the court is manifestly wrong. If the demand for jury trial by defendant was not waived, as the court held, then the court was without jurisdiction to enter the final judgment, ^{the} and finding and order granting defendant a trial upon the merits should be affirmed. It is not necessary to discuss the many authori-

himself engaged; that the court asked him if the plaintiff was willing
 to waive the jury in the case, and he said he was; that he had
 always been willing, and now the court said, "Well, we will just
 not do that for a day when the hearing without a jury; " that he
 (the witness) replied that was correct; that the court said, "I am
 sorry" and instructed the clerk to continue the case for hearing be-
 fore the court, "jury waived." On cross-examination this witness
 said that the attorney for defendant agreed on June 18th to waive
 the jury, and that "I never heard him afterwards waive it."
 On the contrary, no recollection of the hearing testified that
 he was present on June 18th; that although the plaintiff indicated
 he was willing to waive the jury; that the hearing stated that was
 all right to him, "and would have been all right if the plaintiff
 had not waived it." This witness testified positively that
 he was not in the court room on June 18th. Robert E. Jones testi-
 fied that he did not on June 18th specifically agree to waive the jury
 but merely stated that he did not know of any reason why it could
 not be waived, although he said that he said this before the
 fact the trial "was" in the morning, he said that on June 18th when
 in the court he did not see either Kennedy or Weingarten and did not
 return to the courtroom that morning.
 In a proceeding of this kind, where the judge was engaged
 the other is also the judge hearing the petition, and where the court
 after hearing conflicting evidence makes a finding, we claim a court
 of review would hesitate to find to the contrary, since the trial
 judge has most direct knowledge in weighing the evidence. We can
 not say that the finding of the court is manifestly wrong. If the
 demand for jury trial by defendant was not waived, as the court held,
 then the court was without jurisdiction to enter the final judgment,
 and finding and order granting defendant a trial upon the merits
 would be arbitrary. It is not necessary to discuss the many authori-

ties, of which we cite a few. Imbrie v. Bear, 230 Ill. App. 155;
Izri v. Lalonde, 248 Ill. App. 90; Wolley v. Klein, 257 Ill. App.
171; and De Stefano v. Miles, 266 Ill. App. 353.

The order of the Municipal court is affirmed.

AFFIRMED.

McSurely, P. J., and O'Connor, J., concur.

[illegible]

1900

J. MORRIS, (Plaintiff),
Appellee.

vs.

IDA FINKEL and MORRIS
FINKEL, (Defendants).

On Appeal of BERNARD JADWIN
and MILTON JOHNSON, Doing
Business as STATE SECURITIES
COMPANY, (Garnishees),
Appellants.

73 H
APPEAL FROM MUNICIPAL COURT
OF CHICAGO.

270 I.A. 625³

MR. JUSTICE MATCHETT DELIVERED THE OPINION OF THE COURT.

J. Morris, judgment creditor of Ida Finkel and Morris Finkel, caused a garnishee summons to be issued against Bernard Jadwin and Milton Johnson, doing business as State Securities Company. The garnishees answered under oath that nothing was due and that they had no property of the judgment debtors in their possession. There was a trial by the court and a finding for plaintiff Morris for \$836.25, from which the garnishees appeal.

It is contended in the first place that there is no evidence in the record which, upon any theory, would sustain a judgment against Milton Johnson. An examination of the record discloses that this contention is correct. We have searched the record in vain for any evidence tending to show a liability on the part of Milton Johnson. Indeed, plaintiff, challenged by this argument, replies in his brief by referring to a statement made by counsel for garnishees to the effect that he represented Bernard Jadwin and Milton Johnson, doing business as State Securities Company, and to the fact that when the court asked counsel for garnishees whether his client was one of the co-partners (meaning with Milton Johnson) he did not make any denial of the partnership relationship. Plaintiff further replies that garnishees in their answer made no such denial.

J. MORRIS, (Plaintiff),
vs.
J. MORRIS, (Defendant).

THE JURY and VERDICT
(Verdict)
ON APPEAL OF JAMES LAMAR
and MILTON JOHNSON, doing
business as STATE INSURANCE
COMPANY, (Defendant),
vs.
J. MORRIS, (Plaintiff).

APPEAL FROM MUNICIPAL COURT

OF INDIANA.

270 I.A. 632

THE JURY AND VERDICT

J. Morris, plaintiff of 184 Third and Morris
streets, caused a garnished summons to be issued against James
Lamar and Milton Johnson, doing business as State Insurance
Company. The garnished summons was served upon them and they
appeared in court. They had no property of the judgment debtor in their
possession. There was a trial by the court and a finding for
plaintiff Morris for \$250.00. From which the garnished appeal.
It is contended in the first place that there is no evi-
dence in the record which, upon any theory, would sustain a judg-
ment against Milton Johnson. An examination of the record dis-
closes that this contention is correct. We have searched the
record in vain for any evidence tending to show a liability on the
part of Milton Johnson. Indeed, plaintiff, supported by this
argument, relies in his brief by reference to a statement made by
counsel for garnishee to the effect that he represented James
Lamar and Milton Johnson, doing business as State Insurance
Company, and on the fact that when the court asked counsel for
garnishee whether his client was one of two co-partners (naming
Milton Johnson) he did not make any denial of the partnership.
Nevertheless, plaintiff relies upon this evidence in their
brief and we are unable to find any evidence in the record which

It is true that when the members of the partnership were summoned as garnishees they made no denial of the existence of the partnership, and as we understand it they do not now deny the existence of the same; but these facts cannot in any way be taken as conceding the liability of the members of the partnership as garnishees.

The controlling question to be determined upon the trial was whether the partnership summoned at the time of the service of the writ owed the judgment debtors anything or had property, credits, etc., in its possession belonging to them. If it be conceded that one of the partners as an individual had such funds in his possession at that time, this would not justify a judgment against both partners. The judgment is therefore clearly erroneous as to Johnson, and being erroneous as to one it must be reversed as to both.

An examination of the record leads us to the conclusion that there is no liability in the proceeding as against Jadwin. The question of his liability depends upon the construction of a writing which appears in evidence as Garnishees' Exhibit 1. This writing is dated March 11, 1932, states that it is "between Morris Finkel of the first part, and Bernard Jadwin, as Trustee, of the second part," and recites that Finkel is indebted on notes secured by a trust deed conveying the premises known as 3442-44 West Roosevelt Road, Chicago, in which Finkel has a beneficial interest; that interest upon the indebtedness secured by the trust deed to the amount of \$1500 is due and unpaid; that the bank designated in the trust deed is no longer doing business and payment cannot be made there; that Finkel constituted Bernard Jadwin trustee, for the benefit of the legal owners and holders of the bonds or notes; that Finkel has paid \$100 for their benefit to apply on the interest; that Jadwin as trustee shall distribute this and further sums

It is true that when the members of the partnership were
summoned as witnesses they made no denial of the existence of the
partnership, and as we understand it they do not now deny the ex-
istence of the same; but these facts cannot in any way be taken as
constituting the liability of the members of the partnership as par-
tners.

The controlling question to be determined upon the trial
was whether the partnership commenced at the time of the service of
the writ upon the judgment debtors claiming to have property,
creditors, etc., in the possession belonging to them. It is be-
lieved that one of the partners at an individual had such funds
in his possession at that time, this would not justify a judgment
against both partners. The judgment is therefore clearly erroneous
as to Johnson, and being erroneous as to one it must be re-
versed as to both.

An examination of the record leads us to the conclusion
that there is no liability in the proceeding as against Johnson.
The question of his liability depends upon the construction of a
writing which appears in evidence as "Exhibit 1." This
writing is dated March 31, 1893, states that it is "between parties
known of the first part, and Edward Johnson, as Trustee, of the
second part," and recites that Finkel is indebted on notes se-
cured by a trust deed conveying the premises known as 3412-43 West
Roosevelt Road, Chicago, in which Finkel has a beneficial interest;
that payment upon the indebtedness secured by the trust deed to
the amount of \$1000 is due and unpaid; that the bank designated in
the trust deed is no longer doing business and payment cannot be
made there; that Finkel constituted Edward Johnson trustee, for the
benefit of the legal owners and holders of the bonds or notes; that
Finkel has said also for their benefit to apply on the interest;
that Johnson as trustee shall distribute this and interest same

thereafter to be paid until a sufficient sum should be deposited to meet the entire installment of interest due. The agreement recites:

"It is the purpose in making the aforesaid payment to said Bernard Jadwin, Trustee, to part absolutely with all right to said sum so paid, and it is agreed between the parties that the said Morris Winkel shall have no right to receive the return of any portion of the said sum so paid, the parties considering that the said sum so paid, as well as any further sums so paid hereunder, is absolutely and irrevocably appropriated to the use and benefit of the legal holders and owners of interest coupons heretofore described, evidencing the installment of interest due upon the 11th day of June, A. D. 1932, secured by the trust deed hereinbefore described."

The instrument appears to have been duly signed and sealed.

In response to subpoena issued at the request of plaintiff, the ledger account of M. Jadwin as trustee was produced and offered in evidence. It shows various payments made on account of interest and of rents from the building and the balance of the account of \$670.

Evidence was also introduced which shows that plaintiff was the owner of one of the bonds secured by the trust deed for the sum of \$500; that he received a letter requesting him to sign an agreement for the extension of the date of payment of the bond, but that he refused to do so. It further appears from the evidence that the judgment upon which this garnishment proceeding is based was obtained by plaintiff on one of these bonds.

This bond is in evidence. It states upon its face that it, with other bonds of the same issue, is secured by a trust deed, and that the rents of the premises are specifically conveyed and assigned as security without preference of one bond over another.

It is apparent therefore that plaintiff by this garnishment proceeding seeks to secure the rents of the premises and appropriate the same to the satisfaction of his own debt to the exclusion of other bondholders. Plaintiff argues that this trust agreement in reality amounts to the creation of the relationship of principal and

thereafter to be paid until a sufficient sum should be received

to meet the entire installment of interest due. The agreement

was:

"It is the purpose in making the aforesaid agreement to hold
forward herein, together, to hold absolutely with all right to said
sum as paid, and as is agreed between the parties that the said
plaintiff shall have no right to receive the return of any
portion of the said sum as paid, the plaintiff considering that the
said sum as paid, as well as any further sum as paid hereafter,
is absolutely and irrevocably appropriated to the use and benefit
of the legal holder and assigns of interest coupon payments
of the bonds secured by the mortgage and interest due upon the first
day of June, A. D. 1901, secured by the first deed heretofore
deposited."

The instrument appears to have been duly signed and sealed.

In response to subpoena issued at the request of plaintiff,
the latter account of E. Tabin as witness was produced and offered
in evidence. It shows various payments made on account of interest
and of taxes from the building and the balance of the account of

\$270.

Witness was also informed when asked that plaintiff was
the owner of one of the bonds secured by the trust deed for the sum
of \$500; that he received a letter requesting him to sign an agree-
ment for the extension of the date of payment of the bond, but that
he refused to do so. It further appears from the evidence that the
judgment upon which this examination proceeding is based was ob-
tained by plaintiff on one of these bonds.

This bond is in evidence. It states upon its face that it is
with other bonds of the same issue, is secured by a trust deed, and
that the name of the parties are specifically conveyed and assigned
as security without pretenses of one bond over another.

It is apparent therefore that plaintiff by this examination
proceeding seeks to secure the name of the parties and assignments
the name to the extension of his own debt to the extension of
their indebtedness. Plaintiff wishes that this examination be
really amount to the extension of the relationship of principal and

agent between the judgment debtors and Jadwin; that any trust in the fund was revocable by the debtor trustor, and that the agreement amounts^{to}/no more than a direction by Finkel that his debt on the bonds should be paid out of a certain fund and therefore does not create an irrevocable trust. Plaintiff cites a number of cases, such as Douglass v. Martin, 103 Ill. 26; Hamilton v. Downer, 152 Ill. 681; Hibernian Banking Assoc. v. Davis, 295 Ill. 537, and 28 Corpus Juris 121, with other authorities, which state the general rule that an agreement to pay out of a certain fund does not of itself constitute a trust.

We think the cases upon which plaintiff relies are all distinguishable, in that here it appears that the funds were deposited pursuant to a prior contract made in behalf of the beneficiaries; namely, the trust deed made and delivered for the purpose of securing the indebtedness evidenced by their bonds. See 28 Corpus Juris, sec. 164, pp. 120-121.

We hold therefore that a valid trust having been created in this fund for the benefit of all the bondholders, it was not subject to garnishment upon a judgment obtained on one of the bonds by a single holder of one of them. The judgment in favor of plaintiff is therefore reversed.

REVERSED.

McSurely, F. J., and O'Connor, J., concur.

36537

HARRY GOETZ,
Appellee.

vs.

LEO E. RAPP,
Appellant.

74 17
APPEAL FROM MUNICIPAL COURT
OF CHICAGO.

270 I A. 625⁴

MR. JUSTICE O'CONNOR DELIVERED THE OPINION OF THE COURT.

November 13, 1931, plaintiff caused judgment by confession to be entered on a written lease against defendant for \$140, \$115 of which was for rent for November, 1930, and \$25 for attorney's fees. Afterward the judgment was opened, defendant given leave to defend, and he filed his affidavit of merits. At the close of the evidence there was a directed verdict in plaintiff's favor, judgment was on the verdict, and defendant appeals.

The record discloses that defendant leased the third apartment in a building in Chicago for a period from May 1, 1930, to April 30, 1932, at a rental of \$115 a month, payable in advance. In addition to the apartment the lease included a stall in a garage on the rear of the premises. By the terms of the lease the landlord agreed to clean the ceiling and do other work on the apartment. Defendant occupied the apartment and paid all rent promptly, including September, 1931. At the end of that month he vacated the premises, claiming he had been evicted. He offered evidence tending to show that the conduct of plaintiff and his family was such that he was forced to vacate the apartment.

Most of the offered evidence was excluded; the court, however, admitted evidence as to what took place on September 17, 1931, but held that this evidence was not sufficient, as a matter of law, to warrant defendant in breaching the lease, and accordingly the jury was directed to find for plaintiff.

Defendant, his wife, and two daughters aged 16 and 21 respectively, occupied the third apartment of the three-apartment building; plaintiff, the landlord, his wife and child occupied the second

HARRY GOODY,
Defendant.
vs.
JAMES E. HART,
Plaintiff.

STATE OF ILLINOIS,
County of Cook.

IN SENATE

THE JUDICIAL DEPARTMENT OF THE STATE OF ILLINOIS.

November 15, 1931, Plaintiff caused judgment by confession to be entered on a writ of habeas corpus for \$100,000, of which was for rent for November, 1930, and for attorney's fees. Plaintiff caused judgment to be entered for \$100,000, and he filed his affidavit of assets. At the time of the entry of the judgment, a certified check for \$100,000, was sent him by the sheriff, and returned to him.

The record discloses that defendant leased the said apartment in a building in Chicago for a period from May 1, 1930, to April 30, 1932, at a rental of \$115 a month, payable in advance. In addition to the apartment the lease contained a provision in the form of the premises. By the terms of the lease the landlord agreed to place the ceiling and to other work on the apartment. Defendant occupied the apartment and with all his family, including his wife, for 1931. At the end of said month he vacated the premises, claiming he had been evicted. He offered evidence tending to show that the conduct of plaintiff and his family was such that he was forced to vacate the apartment.

Most of the offered evidence was excluded; the court, however, admitted evidence as to what took place on November 17, 1931, and held that this evidence was not sufficient, as a matter of law, to warrant defendant in proceeding in the instant, and accordingly the jury was directed to find for plaintiff.

Defendant, his wife, and two daughters aged 14 and 12 respectively, occupied the third apartment of the three-apartment building; plaintiff, the landlord, his wife and child occupied the second

and another tenant the first apartment. Defendant offered to show that the building was so constructed that ordinary conversations in one apartment could be heard in the adjacent apartment; that plaintiff and his wife often engaged in violent and disorderly quarrels, using profane, vile and indecent language, most of which was unavoidably overheard by defendant and his family; that in November, 1930, there was some trouble with the electric wiring in the building and plaintiff accused defendant and his family of having been the cause of this trouble; "and at the same time he became insulting and abusive in his remarks concerning this affiant and his family," without any provocation; that December 24, 1930, while defendant and his family were in their apartment, plaintiff and his wife engaged in an "unusually violent quarrel," which defendant and his family overheard; that plaintiff called his wife "vile, vulgar and obscene names," and there was pounding on the doors of plaintiff's apartment occasioned by the altercation between plaintiff and his wife; that as a result of this quarrel defendant's younger daughter became hysterical; that on January 5, 1931, plaintiff met defendant's wife in the basement of the building and told her that defendant and his family had been making "all kinds of noise on New Year's eve" and it would have to stop, and that "You can break your lease any time you feel like it;" that thereupon defendant's wife remonstrated, slammed the door and left. Defendant further offered to show that during Saturdays and Sundays of the winter of 1930-31, plaintiff failed to heat the apartment as the lease provided, the temperature sometimes falling as low as 55 degrees.

Substantially all the foregoing offers of proof were excluded upon objection of plaintiff. The court admitted evidence offered by defendant which, in substance, is that about the first part of September, 1931, the lock on the service door on the side of the garage was changed so that defendant could not get in or out of the garage through that door; that on the evening of September 17, 1931, plain-

and another toward the first apartment. Defendant offered to show
that the building was so constructed that ordinary conversations in
one apartment could be heard in the adjacent apartment; that plain-
tiff and his wife often engaged in violent and disorderly quarrels,
using profane, vile and indecent language, most of which was unavail-
ably overheard by defendant and his family; that in November, 1930,
there was some trouble with the electric wiring in the building and
plaintiff accused defendant and his family of having been the cause
of the trouble; that at the same time he became harassing and
abusive in his conduct toward this witness and his family;
without any provocation; that December 24, 1930, while defendant
and his family were in their apartment, plaintiff and his wife en-
tered in an "unusually violent quarrel," which defendant and his
family overheard; that plaintiff called all wife "vile," vulgar and
obscene names," and there was something in the house of plaintiff's
apartment evidenced by the conversation between plaintiff and his
wife; that as a result of this quarrel defendant's younger daughter
became hysterical; that on January 5, 1931, plaintiff was defendant's
wife in the presence of the building and told her that defendant and
his family had been making "all kinds of noise on New Year's eve"
and it would have to stop, and that "you can hear your name and
the way you talk it"; that defendant defendant's wife threatened,
threatened the death of her 17-year-old daughter; that on the day
during defendant was manager of the club at 1000-11, plaintiff
called in that the apartment on the lower floor, was inoperative
and was called on to be repaired.

Defendant calls all the foregoing acts of proof were explained
upon objection of plaintiff. The court admitted evidence offered by
defendant which, in substance, is that about the first part of Jan-
uary, 1931, the law on the matter about on the side of the bridge
was ordered to that defendant would not be or was of the bridge
through that court that on the evening of December 24, 1930, while

tiff and his wife had another violent quarrel in the 2nd apartment; that defendant and his family unavoidably heard plaintiff call his wife vile and filthy names and use obscene language toward her. The evidence farther shows that about ten days thereafter defendant entered into a written lease for an apartment with the owner of a building located about ten feet from the apartment building in question, and further, that about September 28, 1931, just after the new lease had been made, the new landlord told defendant that in February, 1931, he had talked with plaintiff and plaintiff stated at that time he would give the new landlord \$100 if he would take defendant out of plaintiff's flat. This latter offer was excluded. Defendant further testified that he made no objection at any time to plaintiff concerning the quarrels plaintiff and his wife were having in their apartment, and that he made no complaint to plaintiff at any time about anything in connection with any matters of which he now complains.

Where a landlord commits acts of such character as amount to constructive eviction, or where he omits to do those things required of him by the lease which would warrant the tenant in vacating the premises, but the tenant fails to vacate and pays rent thereafter, he waives the breach of the lease by the landlord. There cannot be constructive eviction without surrender of the premises. Kinn v. Slyde, 246 Ill. App. 26; Seating v. Springer, 146 Ill. 481; Vintalero v. Pappas, 310 Ill. 115. Applying this rule of law to the instant case, we are of the opinion that even if we assume that the conduct of the plaintiff landlord prior to September 17, 1931, was such as would authorize the defendant in vacating the premises, yet he having failed to do so, those breaches were waived. It is also the law that where the conduct of the landlord is such that the tenant would be warranted in vacating, the tenant is not obliged to vacate at once but is entitled to a reasonable time after such breach; and what is a reasonable time is generally a question of fact. Kinn v.

[illegible]

Slyde, supra, and cases there cited; Ciddings v. Williams, 336 Ill. 402.

The question for decision then is, Was the conduct on the part of the landlord in changing the lock on the door to the side entrance of the garage and the quarrel of September 17th, such as would amount in law to a constructive eviction, defendant having paid no rent after September 17th, and having vacated the apartment? We think the answer must be in the negative, especially when it is considered that defendant at no time made any complaint to plaintiff of the latter's conduct. To constitute an eviction under the law, there must be something of a grave and permanent character done by the landlord clearly indicating an intention (express or implied) of the landlord to deprive the tenant of longer beneficial enjoyment of the premises. Automobile Supply Co. v. Seen-In-Action Corp., 340 Ill. 196; Gibbons v. Seefeld, 299 Ill. 455; Linsey v. Zimmerman, 329 Ill. 75. While it is generally a question of fact whether the acts or omissions of the landlord would amount to constructive eviction, yet when all reasonable minds would reach the conclusion that such acts or omissions were not of a grave or permanent character, then the question is one of law for the court.

In the instant case, we are of the opinion that the conduct of the landlord during the month of September, assuming as we must on this record, that the offers of proof made by defendant were true, was not of such a grave and permanent character as would amount to a clear indication of intention on the part of the landlord to deprive the tenant of the enjoyment of the premises, and therefore did not constitute an eviction.

The judgment of the Municipal court of Chicago is affirmed.

JUDGMENT AFFIRMED.

McSurely, P. J., and Matchett, J., concur.

THE COURT, AND THAT THERE IS NO REASON TO BELIEVE THAT THE

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The question for decision then is, Was the conduct on the part of the landlord in changing the lock on the door to the side entrance of the house and the denial of December 17th, such as would amount in law to a constructive eviction, defendant having

paid no rent after December 17th, and having vacated the premises? We think the answer must be in the negative, especially when it is

considered that defendant at no time made any complaint to plaintiff of the landlord's conduct. No complaint or eviction under the law,

there must be something of a grave and permanent character done by the landlord clearly indicating an intention (express or implied)

at the landlord to deprive the tenant of the use and enjoyment of the premises. In this case, the landlord's conduct is not such as to

justify the tenant's refusal to pay rent. The landlord's conduct is not such as to justify the tenant's refusal to pay rent.

It is true that the landlord's conduct is not such as to justify the tenant's refusal to pay rent. The landlord's conduct is not such as to justify the tenant's refusal to pay rent.

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It is true that the landlord's conduct is not such as to justify the tenant's refusal to pay rent. The landlord's conduct is not such as to justify the tenant's refusal to pay rent.

36575

NANCY WASSMAN,
Appellee,

vs.

CHICAGO TITLE & TRUST COMPANY
et al.

EDWARD A. MILLER,
Appellant.

APPEAL FROM SUPERIOR COURT
OF COOK COUNTY.

270 I.A. 626¹

MR. JUSTICE O'CONNOR DELIVERED THE OPINION OF THE COURT.

By this appeal the defendant, Edward A. Miller, seeks to reverse a decree entered in a foreclosure case.

December 7, 1931, complainant filed her bill to foreclose a trust deed dated September 24, 1927, given to secure the payment of \$6,000 represented by three notes, two of \$500 each, due three and four years after date, and one for \$5,000 due five years after date. Complainant alleged that she was the owner of the \$5,000 note and coupons, "all of the rest of the principal and interest notes having been duly paid, cancelled, or the lien thereof otherwise extinguished. The unknown owners and holders of unpaid notes secured by the trust deed were made parties defendant. There were a number of defendants but the only one who entered an appearance was Miller; he filed a demurrer on account of the inconsistency in the allegations of the bill in making unknown owners parties defendant when it had been alleged that the notes had been paid, or the lien thereof otherwise extinguished. The demurrer was sustained and defendant, by leave of court, filed an amended bill eliminating this inconsistency, and the unknown owners of the notes were dropped as defendants. Miller answered the amended bill and denied that all the rest of the principal and interest notes had been paid and cancelled, but averred that on June 10, 1930, the time of payment of the two principal notes of \$500 each had been extended to September 24, 1932. He admitted that he owned the fee of the property on which the trust

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deed was being foreclosed; that a mechanic's lien had been foreclosed on the property, a sheriff's deed issued, and a redemption made from the decree entered in the mechanic's lien case, and the property later conveyed to him; that in the mechanic's lien suit the trustee of the trust deed, as well as the owners of the notes, were made defendants, and later the unknown owners of the notes were defaulted and a decree of foreclosure entered; that it was found in the decree that the lien in the mechanic's ^{lien} case was superior to that of the trust deed or note holders in the instant case; that afterward there was a master's sale but no redemption had been made; that the decree was in full force and effect; and denied that the trust deed sought to be foreclosed was a lien on the property.

Afterward, by leave of court, complainant amended her amended bill, alleging that Miller was the owner and holder of a trust deed which was a second lien on the premises, and that since he became the owner of the fee, the lien of the second trust deed was extinguished. Miller answered the amendment by admitting that he was the owner and holder of the notes secured by the second trust deed but denied that the lien was extinguished because of his ownership of the fee. Replication was filed and afterward the cause was referred to a master who took the proofs and made up his report. He recommended a decree of foreclosure in accordance with the prayer of the bill. Objections to the report were overruled and afterward the Chancellor overruled exceptions, entered a decree, and this appeal followed.

The record discloses that on September 24, 1927, the owners of the premises, the Apelings, borrowed \$6000 to pay for erecting a building on the premises and made the three promissory notes hereinabove mentioned. Afterward there was a mechanic's lien foreclosure in the Superior court and a judgment was entered in the

that was being furnished; that a mechanic's lien had been filed
 closed on the property, a sheriff's deed issued, and a redemption
 made from the house entered in the mechanic's lien book, and the
 property later conveyed to him; that in the mechanic's lien book
 the trustee of the trust deed, as well as the owner of the notes,
 were made defendants, and later the unknown owners of the notes
 were defaulted and a decree of foreclosure entered; that it was
 found in the decree that the lien in the mechanic's ^{lien} book was an-
 nounced by that of the trust deed is not binding in the future;
 that this affidavit itself was a notice; that no redemption
 had been made; that the house was in full force and effect; and
 denied that the trust deed sought to be foreclosed was a lien on
 the property.

Afterward, by leave of court, supplementary amended bill
 amended bill, alleging that Miller was the owner and holder of a
 first deed which was a second lien on the premises, and that since
 he became the owner of the fee, the lien of the second deed deed
 the first deed. Miller requested the court to adjudge that
 he was the owner and holder of the notes created by the second trust
 deed and denied that the lien was extinguished because of his guar-
 anty to the fee. Defendant and first and second bills were
 the subject of a master who said the trust deed was not a
 lien. He recommended a decree of foreclosure in conformity with
 the prayer of the bill. Opposed to the second bill was
 and afterward the defendant requested adjournment, entered a notice
 and this appeal followed.

The record discloses that on September 24, 1907, the court
 at the plaintiff, the defendant, entered judgment, and the plaintiff
 a bill of sale on the premises and made two other preliminary notes
 heretofore mentioned. Afterward there was a mechanic's lien
 foreclosed in the plaintiff's name and a judgment was entered in the

Municipal court which was a lien on the property, and it seems to be agreed that on June 10, 1930, the legal title to the premises was in Mr. and Mrs. McCormick. The notes and trust deed involved were then owned by the Capital State Savings Bank, and the defendant Miller was the owner of a second mortgage on the premises. On that date an agreement was entered into between the three parties whereby the time of payment of the two \$500 notes was extended to September 24, 1932. The agreement recited the judgment in the Municipal court and the mechanic's lien decree, as above mentioned, and it was mutually agreed that in consideration of extending the time of payment of the two \$500 notes the decree in the mechanic's lien case would be opened up and all parties, so far as it affected the trust deed being foreclosed in this case and the notes secured by the same, should be dismissed out of that case; and that the lien of the trust deed being foreclosed in the instant case should be a first and prior lien on the premises. Afterward orders were entered in the mechanic's lien suit in accordance with the written agreement.

The evidence further shows that the bank sold the \$5000 note and trust deed to the complainant in October or November, 1930; that the fee of the premises was transferred to the defendant Miller August 21, 1931, and thereafter, on November 15, 1931, defendant Miller paid to the receiver of the Capital State Bank \$700 for the two \$500 notes which the receiver delivered to him together with the interest coupons. It further appears that on July 7, 1931, Miller, who owned the \$2000 installment note secured by the second trust deed on the premises, filed his bill to foreclose that trust deed in the Superior court of Cook county, wherein he admitted that the lien of the trust deed involved in the instant case was a superior lien.

On the hearing before the master Miller testified to the

...and it seems to
be agreed that on June 15, 1935, the land title to the premises
was in Mr. and Mrs. Robertson. The notes and first deed involved
were then owned by the Capital State Savings Bank, and the following
Miller was the owner of a second mortgage on the premises. On that
date an agreement was entered into between the three parties where-
by the title of payment of the two \$200 notes was assigned to the
Robertson. The agreement further provided that the title to the land
should remain with the Robertsons' title company, as above mentioned,
and it was mutually agreed that in consideration of extending the
time of payment of the two \$200 notes the Robertsons' title
company would be given an oral promise, to the effect that
the land deed being recorded in this case and the notes secured
by the same, should be assigned out of that case; and that the
time of the first deed being recorded in the instant case should
be a first and prior lien on the premises. Affirmative orders were
entered in the mechanic's lien suit in accordance with the written
agreement.

The evidence further shows that the bank sold the \$200 notes
and first deed to the commission in October of November, 1935; that
the fee of the premises was transferred to the defendant Miller
August 11, 1935, and immediately, on August 12, 1935, defendant
Miller paid to the receiver of the Capital State Bank \$750 for the
two \$200 notes with the interest allowed to the defendant
on interest expense. It further appears that on July 7, 1935,
Miller, who owned the \$200 installment was secured by the bank
first deed on the premises, filed his bill to foreclose that deed
first in the Register Court at that county, wherein he obtained that
the time of the first deed involved in the instant case was a first
prior lien.

On the instant matter the master Miller testified to the

effect that he had bought the two \$500 notes from the receiver of the bank for one of his clients. It further appears from the evidence that at the time Miller received the notes from the receiver they were delivered to him uncanceled. There is other evidence in the record but we think it unnecessary to refer to it here.

The master found that the lien of the two \$500 notes became extinguished by reason of the fact that Miller, who bought them from the bank, was the owner of the fee. When the case was pending before the Chancellor on exceptions to the master's report, leave was given to complainant to file her second amended bill of complaint to conform with the proofs taken before the master. The second amended bill was filed October 13, 1932. Defendant Miller moved to strike it from the files, the motion was overruled and on October 31, 1932, the decree of foreclosure appealed from was entered.

Although the defendant, in his answer, set up as his defense that the lien of complainant's trust deed was extinguished by the mechanic's lien proceeding, yet in his first brief filed in this court no such contention is made, and it may therefore be considered as having been waived. But in any event, there is no merit in the contention because the record discloses that after the decree was entered in the mechanic's lien case, the owner of the \$5000 note in foreclosure filed a petition in that case, had the order entered vacating the decree as to the owner of that note, filed her answer, and afterward, on June 10, 1930, the written agreement we have above discussed was entered into, providing that the mechanic's lien proceeding be dismissed as to the owner of the \$5000 note and trust deed. This was accordingly done. Defendant having been a party to that agreement and having there agreed that the trust deed here involved was a first lien on the premises, is now estopped to contend that the trust deed was not a lien on the premises in question.

A further argument is made that the decree is erroneous and

...that he had bought the two lots from the plaintiff at
the back lot out of his estate. It further appears from the evi-
dence that at the time Miller received the notes from the plaintiff
that the plaintiff was in the possession of the land. There is also evidence
that the plaintiff was in the possession of the land at the time
the notes were issued. The plaintiff found that the two lots were
evidenced by reason of the fact that Miller, who bought them from
the plaintiff, was the owner of the land. When the notes were issued he
told the defendant an exception to the plaintiff's report, leave the
given to the plaintiff in the fact that the plaintiff was in the possession
of the land at the time the notes were issued. The notes
were issued to the plaintiff in the fact that the plaintiff was in the
possession of the land at the time the notes were issued and on October
11, 1900, the date of the plaintiff's report, the notes were issued.
Although the defendant, in his answer, set up as his defense
that the fact of the plaintiff's report was established by the
evidence, yet in his first brief filed in this
case he made no mention of the fact, and it may therefore be considered
as having been waived. But in any event, there is no merit in the
defendant's defense. The plaintiff's report was in the nature of a
statement in the plaintiff's case, the owner of the land was in
possession of the land at the time the notes were issued and the order entered
against the notes as to the owner of the land, filed her answer,
and although, on June 11, 1900, the written agreement was made above
stated was entered into, providing that the mechanic's lien was
being so claimed as to the owner of the land was and that
fact. This was accordingly done. Defendant having been a party
to that agreement and having there agreed that the fact that the
land was a fact as to the plaintiff, is now returned in the
fact that the fact that the fact was not a fact on the plaintiff in question.
A further statement is made that the notes in question were

should be reversed because the evidence shows that Miller's client owned the two \$500 notes and was not made a party defendant. We think this contention is equally without merit. The first intimation that any one other than Miller claimed to own these notes was when defendant was testifying in his own behalf. The bill alleged that these two notes had been paid or the lien on them had been otherwise extinguished. The answer denied that they had been paid, but there was no denial that the lien of them had been extinguished. Moreover, the master was warranted in disbelieving the testimony of defendant to the effect that he had bought the notes for his client, for in view of the fact that defendant Miller at the time was contending that the trust deed was no longer a lien on the premises, it would be highly improbable that he could obtain a client who would pay \$700 for the notes. But since the defendant owned the fee it was perfectly logical for him to buy these two notes for \$700 and relieve the lien on the premises to that extent.

A number of technical points are made by the defendant, - among them, that the court permitted the second amended bill to be filed but did not rule defendant to answer. It is apparent there was nothing to answer, the amendment to the bill being simply to make it conform to the proofs made. No complaint was made when the order was entered that defendant had not been given a chance to answer; nor is any suggestion made as to anything he might have in the way of an answer that would affect the merits of the case. The fact that the replication was not withdrawn before the amended bill was filed is merely a formal and immaterial objection. A court of review will generally not reverse a judgment or decree where substantial justice has been done and where the only purpose of reversal would be to permit the parties to make a more perfect record.

Lyons v. Kantor, 228 Ill. 336.

The decree of the Superior court of Cook county is affirmed.

AFFIRMED.

McSurely, P. J., and Matchett, J., concur.

36693

PEOPLE OF THE STATE OF ILLINOIS
ex rel. OSCAR NELSON, as Auditor
of Public Accounts of the State
of Illinois,

Complainants,

vs.

WEST HIGHLAND STATE BANK, a
Corporation,

Defendant.

In the Matter of the Intervening
Petition of ELIZABETH DOYLE,
Appellee,

vs.

IRWIN T. GILRUTH, Receiver of West
Highland State Bank, a Corporation,
Appellant.

76 H
APPEAL FROM SUPERIOR
COURT OF COOK COUNTY.

270 I.A. 626²

MR. JUSTICE O'CONNOR DELIVERED THE OPINION OF THE COURT.

By this appeal Irwin T. Gilruth, receiver of the West Highland State Bank, a corporation, seeks to reverse an order or decree entered by the Superior court of Cook county allowing the claim of Elizabeth Doyle in the sum of \$1000 as a preferred claim conditionally.

The evidence offered by the claimant, Elizabeth Doyle, is to the effect - and the order of the court finds - that on or about May 26, 1931, she went to the West Highland State Bank in Chicago, in which bank she had a savings account and pass book number 13968. This savings account was opened January 6, 1931, and at the time in question there was \$265 in the account. On May 26, 1931, claimant appeared at the bank and spoke to one of the savings tellers, telling him she wanted a cashier's check for \$940, which she desired to use for rent, and that she wanted to deposit \$60 in her savings account; she was given the check for \$940 and deposited the \$60 as shown in her book number 13968; she had another \$1000 check with her that she wanted to leave at the bank in trust because she intended to use it in a week or two to start in the

restaurant business, for which she had purchased chairs, tables, etc., and would need the money to pay for them. The teller replied that it would be all right and he then opened another saving account, giving her a book number 14432 in which the \$1000 was noted. This is the only item shown in the book. The bank was closed on June 9, 1931, by the auditor of public accounts and later the receiver was appointed. The claimant sought to have the \$1000 last mentioned allowed as a preferred claim. The court entered an order allowing it as a preferred claim conditionally. The order provided that the \$1000 "is a claim entitled to preference and priority of payment by said Irwin T. Gilruth as receiver for said defendant bank, provided that ^{upon} the distribution of the assets of said bank it is determined that there were in the possession of said defendant bank at the time of the closing thereof, and that there came into the hands of said receiver among the assets of said defendant bank certain assets subject to the claim of general creditors, and that the moneys of said petitioner are a part of said assets and should be paid therefrom, ***."

In this court the receiver alone has filed a brief, the claimant, Elizabeth Doyle, not appearing; and the argument is made that the \$1000 was not held in trust by the bank but was the ordinary savings account. There is no explanation, however, as to why the second savings account was opened by the claimant. If it was the ordinary savings account, why was not the money placed in the account she ^{had} already carried at the bank for several months and noted in her book number 13965? There is no explanation of this in the receiver's brief. These facts tend strongly to support claimant's contention, but we are unable to pass upon the merits of this claim for the reasons stated in an opinion we are this day filing in number 36361, People ex rel. Oscar Nelson, Auditor of Public Accounts, v. The Stony Island State Savings Bank, where

restaurant business, for which she had purchased shares, and
etc., and would need the money to pay for them. The father re-
plied that it would be all right and he then opened another savings
account, giving her a book number 1448 in which the \$1000 was
noted. This is the only item shown in the book. The bank was
closed on June 2, 1931, by the receiver of public accounts and
later the receiver was appointed. The claimant sought to have the
\$1000 last mentioned allowed as a preferred claim. The court an-
nounced an order allowing it as a preferred claim conditionally.
The first finding was that the \$1000 is a claim entitled to prefer-
ence and priority of payment by said Lewis E. Blinn as receiver
for said defendant bank, provided that the distribution of the as-
sets of said bank is determined that there were in the possession
of said defendant bank at the time of the closing thereof, and that
there came into the hands of said receiver among the assets of
said defendant bank certain assets subject to the claim of said
creditors, and that the money of said petitioner was a part
of said assets and should be paid thereon, etc."

In this court the receiver alone has filed a brief, and
has made the following findings, and the court is
satisfied that the \$1000 was not held in trust by the bank but was for
ordinary savings account. There is no explanation, however, as
to why the second savings account was opened by the claimant. It
was the ordinary savings account, why was the money placed
in the account and already carried at the bank for several months
and noted in her book number 13687? There is no explanation of
this in the receiver's brief. There is no attempt to support
claimant's contention, but we are unable to pass upon the merits
of this claim for the reasons stated in an opinion we are this
day filing in another case, Bank of America v. Lewis E. Blinn, and
in Blinn v. Bank of America, v. the above named parties.

a similar order was entered allowing the claim of Patrick and Anna Melan as a preferred claim conditionally. We there held that the order was not final and appealable, and for the reasons stated in that opinion the appeal in this case is dismissed.

APPEAL DISMISSED.

McSurely, P. J., and Hatchett, J., concur.

[illegible]

CHINESE JOURNAL OF

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36739

MRS. JENNIE TAYLOR,
Appellee,

vs.

CARL A. CARLSON et al.

CARL A. CARLSON and ANNA F. CARLSON,
Appellants.

INTERLOCUTORY APPEAL
FROM SUPERIOR COURT
OF COOK COUNTY.

270 I.A. 626³

MR. JUSTICE O'CONNOR DELIVERED THE OPINION OF THE COURT.

By this appeal Carl A. Carlson and Anna F. Carlson (who will hereafter be designated as the defendants) the makers of two promissory notes aggregating \$18,000, payment of which was secured by a trust deed on certain premises in Cook county, Illinois, seek to reverse an order of the Superior court of Cook county appointing a receiver in a suit brought by complainant to foreclose a trust deed. The appointment was made on the verified bill to which were attached the notes and trust deed as exhibits and made a part thereof.

The question therefore is the sufficiency of the allegations of the bill. It was alleged in the bill that on June 1, 1929, defendants being indebted for \$18,000, executed their two promissory notes, one for \$5,000 due one year after date, and one for \$13,000 due two years after date, etc. To secure the payment they executed the trust deed in question. It was further alleged that the two notes were overdue and unpaid, and that the trust deed provided that immediately upon filing a bill to foreclose, a receiver might be appointed to collect the rents. The trust deed contained a provision that a receiver might be appointed in case of default without notice and without regard to the solvency or insolvency of the makers and without regard to the value of the premises. The foregoing are the only matters that are material to

THE CHAMBERLAIN TRUST, INC.,
CHICAGO, ILL.

CHAMBERLAIN TRUST, INC.
CHICAGO, ILL.

OF CHICAGO, ILL.

CHAMBERLAIN TRUST, INC.,
CHICAGO, ILL.

280 I.A. 686

IN RE: CHAMBERLAIN TRUST, INC. AND OTHERS.

By this report, CHAMBERLAIN TRUST, INC. and ANNE T. CHAMBERLAIN, who will hereafter be designated as the defendants, the master of the promissory notes aggregating \$12,000, payment of which was secured by a trust deed on certain premises in Cook County, Illinois, seek to reverse an order of the Superior Court of Cook County appointing a receiver in a suit brought by complainant to foreclose a trust deed. The appointment was made on the verified bill to which were attached the notes and trust deed as exhibits and made a part of the record.

The question therefore is the validity of the allegations of the bill. It was alleged in the bill that on June 1, 1920, defendants being indebted for \$12,000, executed their two promissory notes, one for \$2,000 due one year after date, and one for \$10,000 due two years after date, etc. To secure the payment they executed the trust deed in question. It was further alleged that the two notes were overdue and unpaid, and that the trust deed provided that immediately upon failing to pay the notes, a receiver might be appointed to collect the notes. The trust deed contained a provision that a receiver might be appointed in case of default without notice and without regard to the validity or invalidity of the notes and without regard to the value of the property. The further fact was alleged that the notes were

be considered on this appeal.

In the order appointing the receiver it is recited that "It appearing to the court that by the terms of the trust deed sought to be foreclosed in this proceeding the rents, issues and profits from the mortgaged premises are pledged as additional security for the payment of the sums secured by such deed of trust," and that due notice having been given of the application of appointment, it was ordered that a receiver be appointed upon complainant and receiver giving bonds, etc.

Counsel for complainant in his brief says that the record fails to contain "any certificate of evidence" that the facts are not brought to the attention of this court that were before the chancellor, which are that the property had been sold for taxes in 1928, that the taxes of 1929 and 1930 were due and unpaid, and no portion of the taxes of 1931 had been paid; that Carl A. Carlson and Anna F. Carlson, the defendants, had disposed of their interest in the property. But we must take the record as we find it. There is nothing in the record to indicate that any of these matters as contended for by counsel for complainant were brought before the chancellor. From the order appointing the receiver it appears that the court made the appointment by virtue of the terms of the trust deed alone. There is nothing in the record that shows there was any default in the payment of taxes or that the Carlsons had transferred their interest in the property, and there is nothing to show the value of the premises involved. We have repeatedly held that the appointing of a receiver is not warranted merely because the trust deed so provides, but that it must affirmatively appear from the record that the appointment of a receiver was necessary to protect complainant's rights so as to insure the payment of the indebtedness. Frank v. Siegel, 263 Ill. App. 316; Harley v. Ill. T. & S. Bank, 199 Ill. 76; Bothman v.

be considered on this appeal.

In the order appointing the receiver it is recited that "it appearing to the court that by the terms of the trust deed made to be foreclosed in this proceeding the rents, issues and profits from the mortgaged premises are placed at additional security for the payment of the same secured by such deed of trust," and that the notice having been given of the application of appointment, it was ordered that a receiver be appointed upon complaint and receiver giving bonds, etc.

Counsel for complainant in his brief says that the record fails to contain "any certificate of evidence" that the facts are not brought to the attention of this court that were before the chancellor, which are that the property had been sold for taxes in 1928, that the taxes of 1929 and 1930 were due and unpaid, and no portion of the taxes of 1931 had been paid; that Carl A. Garrison and Anna F. Garrison, the defendants, had disposed of their interest in the property. But we must take the record as we find it. There is nothing in the record to indicate that any of these matters are contained for by counsel for complainant were brought before the chancellor. From the order appointing the receiver it appears that the court made the appointment by virtue of the terms of the trust deed above. There is nothing in the record that shows there was any default in the payment of taxes or that the Garrisons had transferred their interest in the property, and there is nothing to show the value of the premises involved. We have no doubt that the appointment of a receiver is not warranted merely because the time has not yet expired, but that it must affirmatively appear from the record that the appointment of a receiver was necessary to protect complainant's rights as to the payment of the indebtedness. Frank v. Fierst, 203 Ill. App. 202; Harley v. Ill. T. & S. Bank, 192 Ill. 75; Ill. v.

Lindstrom, 221 Ill. App. 262; Strauss v. Georgian Bldg. Corp., 261 Ill. App. 284, and many other cases.

There being no showing that the appointment of the receiver was necessary to see that complainant would receive full payment of the indebtedness due her, the appointment was unwarranted, and the order is reversed.

ORDER REVERSED.

McSurely, P. J., and Hatchett, J., concur.

...and the

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36340

DOWNNEY COAL COMPANY,
a Corporation,
Appellant,

v.

TRIVIA SWARTZ,
Appellee.

78 A
APPEAL FROM MUNICIPAL

COURT OF CHICAGO.

270 I.A. 626⁴

MR. PRESIDING JUSTICE SCANLAN DELIVERED THE OPINION OF THE COURT.

Plaintiff sued defendant in the Municipal court of Chicago in contract. There was a hearing before the court and at the conclusion of the evidence the issues were found against plaintiff. Plaintiff has appealed from a judgment for costs entered upon the finding. Defendant has not filed an appearance nor a brief in this court.

Plaintiff sued to recover \$110.68 for coal delivered to certain premises owned by defendant. The statement of claim alleges that the coal was delivered to and accepted at the said premises with the knowledge, consent and acquiescence of defendant, who used all of the coal upon the said premises in the heating thereof. The affidavit of merits, made by Max Swartz as agent of defendant, states that she has a good defense to the suit upon the merits; that he, Max Swartz, had been purchasing coal from plaintiff from March, 1928, to September, 1929, upon an open and running account; that defendant never ordered nor purchased any coal from plaintiff; that plaintiff contracted and dealt with him, Max Swartz, and that therefore defendant is not indebted to and does not owe any money to plaintiff for coal nor for any other purpose.

The case is one of five, involving practically similar

270 I.A. 626

THE COURT
IN THE
MAY 1904

IN THE MATTER OF THE ESTATE OF JAMES H. HARRIS, DECEASED.

Plaintiff and defendant in the foregoing cause of
action is connected. There was a hearing before the court
and at the conclusion of the evidence the issues were found
against plaintiff. Plaintiff has appealed from a judgment
for costs entered upon the finding. Defendant has not filed
an appearance nor a brief in this court.

Plaintiff seeks to recover \$1000 for coal delivered
as certain promises made by defendant. The statement of
claim alleges that the coal was delivered as and accepted as
the said promises with the knowledge, consent and acquiescence
of defendant, who used all of the coal upon the said promises
in the heating thereof. The affidavit of service, made by him
through an agent of defendant, states that she has a good defense
to the suit upon the matter; that he, Max Carter, had been
persuaded to sell from plaintiff from March, 1900, to September,
1902, upon an open and running account; that defendant never
ordered nor purchased any coal from plaintiff; that plaintiff
contacted and dealt with him, Max Carter, and that therefore
defendant is not indebted to and does not owe any money to plain-
tiff for coal use for any other purpose.

The case is one of five, involving practically similar

facts, which were all submitted to the trial court upon one hearing.

It was agreed between the parties that under the pleadings the burden of proof shifted to defendant to sustain her defense. Under Rule 15 of the Municipal court of Chicago every allegation of fact in the statement of claim not denied specifically or by necessary implication in the pleading of the defendant must be taken as admitted. The trial court so held and defendant acquiesced in the finding. Therefore, under the pleadings, defendant admitted, first, that she was the owner of the premises in question; second, that the coal sued for was delivered to and accepted at said premises with her consent and acquiescence; third, that the coal was used in the heating of the premises and was necessary in order to properly heat the rooms and apartments therein, and fourth, that plaintiff has not been paid for coal delivered to the premises to the amount of \$110.65. It will be noticed that the affidavit of merits is made by Max Swartz, the agent of defendant. It appears that plaintiff did not know until after the delivery of the coal that the title to the property was not in the name of Max Swartz, but that after the coal was delivered and used it discovered that Max Swartz was simply the agent of defendant, entrusted with the management of the building.

Under the pleadings and the facts of this case defendant is required to pay for the coal in question. Where an agent enters into a contract with a third person without disclosing his principal, the principal, nevertheless, is liable upon discovery, and the third person may elect whether to hold the principal or the agent liable; nor is the creditor compelled to elect until he has knowledge of all the facts surrounding the transaction. (See Limousine and Carriage Mfg. Co. v. Shadburne, 185 Ill. App. 403, 406; Kadish v. Bullen,

facts, which were all submitted to the trial court upon the

testimony.

It was agreed between the parties that under the pleadings the burden of proof shifted to defendant to sustain her defense. Under Rule 12 of the Municipal Court of Chicago every allegation of fact in the statement of claim not denied specifically or by necessary implication in the pleading of the defendant must be taken as admitted. The trial court so held and defendant acquiesced in the finding. Therefore, under the pleadings, defendant admitted that she was the owner of the premises in question; second, that the coal was delivered to and accepted at said premises with her consent and acquiescence; third, that the coal was used in the heating of the premises and was necessary in order to properly heat the rooms and apartments therein, and fourth, that plaintiff has not been paid for coal delivered to the premises for the amount of \$112.68. It will be noticed that the affidavit of service is made by Max Swartz, the agent of defendant. It appears that plaintiff did not know until after the delivery of the coal that the title to the property was not in the name of Max Swartz, and that after the coal was delivered and used it discovered that Max Swartz was simply the agent of defendant, entrusted with the management of the building.

Under the pleadings and the facts of this case defendant is required to pay for the coal in question. Where an agent enters into a contract with a third person without disclosing his relationship the principal, nevertheless, is liable upon discovery, and the third person may elect whether to hold the principal or the agent liable; not in the creditor compelled to elect until he has knowledge of all the facts surrounding the transaction. See Johnson and Harrison v. The City of Chicago, 100 Ill. 402, 408, 20 N.E. 2d 101, 102.

10 Ill. App. 566; Dean et al. v. Duncan, 17 Ill. 272, 275;
Schendel v. Stevenson, 153 Mass. 351.)

"If any innocent party is to suffer, it shall fall upon him who enables the supposed agent, under his authority, to impose on others. And it is upon this principle that the principal may frequently be bound to third persons for acts of the agent in violation of his express private instructions, although the agent himself would be liable to his principal for the breach." Dean v. Duncan, 17 Ill. 272, 275; Noble v. Nugent, 39 Ib. 522, 524." (West Side Hospital v. Eiger, 139 Ill. App. 645, 650.)

"It has from time immemorial been to some extent customary for agents to do in their own names the business of principals; in such case the principal, when discovered, may be sued and held as such, or he may voluntarily come forward and claim the benefit of the contracts made and business done by the agent. Mechem on Agency, Secs. 695, 696, 701, 769. A principal may enforce the payment to himself of unsealed written undertakings taken by and running to his agent. National Life Ins. Co. v. Allen, 116 Mass. 398." (Hair v. North Western Nat. Bank, 50 Ill. App. 211, 214.)

Defendant contended that she was not known to plaintiff at the time of the delivery of the coal, but this fact would not release her from liability under the facts of this case.

"A party to a contract, upon discovery of the fact that he has been dealing with the agent of an undisclosed principal, may hold the latter liable in damages for any breach of the contract." (Longo v. Lewis, 252 Ill. App. 401, 410. See also McNichols v. Kettner, 22 Ill. App. 493, 495; Bruck v. Bowermaster, 36 Ill. App. 510, 511.)

Legally and equitably defendant is indebted to plaintiff in the sum of \$110.65.

The judgment of the Municipal court of Chicago is reversed, with a finding of fact, and judgment is entered here in favor of plaintiff in the sum of \$110.65.

REVERSED WITH A FINDING OF FACT AND JUDGMENT HERE.

Gridley and Sullivan, JJ., concur.

FINDING OF FACT.

We find as an ultimate fact in the case that there is due plaintiff from defendant the sum of \$110.65.

[illegible]

Uspenskiy v. Iovannovskiy, 1872 No. 101.

[illegible]

"It has been impossible for me to see
 especially for agents to go in their own names the business of
 purchasing in such cases the property with absolutely no
 and not to hold as much as he may voluntarily come to
 not claim the benefit of the insurance made and business done
 by the agent. Section 200, 201, 202, 203, 204, 205.
 A principal may sue the agent in behalf of insurance
 policies made by him and running in his name.
 Section 206, 207, 208, 209, 210, 211, 212, 213, 214, 215, 216, 217, 218, 219, 220, 221, 222, 223, 224, 225, 226, 227, 228, 229, 230, 231, 232, 233, 234, 235, 236, 237, 238, 239, 240, 241, 242, 243, 244, 245, 246, 247, 248, 249, 250, 251, 252, 253, 254, 255, 256, 257, 258, 259, 260, 261, 262, 263, 264, 265, 266, 267, 268, 269, 270, 271, 272, 273, 274, 275, 276, 277, 278, 279, 280, 281, 282, 283, 284, 285, 286, 287, 288, 289, 290, 291, 292, 293, 294, 295, 296, 297, 298, 299, 300, 301, 302, 303, 304, 305, 306, 307, 308, 309, 310, 311, 312, 313, 314, 315, 316, 317, 318, 319, 320, 321, 322, 323, 324, 325, 326, 327, 328, 329, 330, 331, 332, 333, 334, 335, 336, 337, 338, 339, 340, 341, 342, 343, 344, 345, 346, 347, 348, 349, 350, 351, 352, 353, 354, 355, 356, 357, 358, 359, 360, 361, 362, 363, 364, 365, 366, 367, 368, 369, 370, 371, 372, 373, 374, 375, 376, 377, 378, 379, 380, 381, 382, 383, 384, 385, 386, 387, 388, 389, 390, 391, 392, 393, 394, 395, 396, 397, 398, 399, 400, 401, 402, 403, 404, 405, 406, 407, 408, 409, 410, 411, 412, 413, 414, 415, 416, 417, 418, 419, 420, 421, 422, 423, 424, 425, 426, 427, 428, 429, 430, 431, 432, 433, 434, 435, 436, 437, 438, 439, 440, 441, 442, 443, 444, 445, 446, 447, 448, 449, 450, 451, 452, 453, 454, 455, 456, 457, 458, 459, 460, 461, 462, 463, 464, 465, 466, 467, 468, 469, 470, 471, 472, 473, 474, 475, 476, 477, 478, 479, 480, 481, 482, 483, 484, 485, 486, 487, 488, 489, 490, 491, 492, 493, 494, 495, 496, 497, 498, 499, 500, 501, 502, 503, 504, 505, 506, 507, 508, 509, 510, 511, 512, 513, 514, 515, 516, 517, 518, 519, 520, 521, 522, 523, 524, 525, 526, 527, 528, 529, 530, 531, 532, 533, 534, 535, 536, 537, 538, 539, 540, 541, 542, 543, 544, 545, 546, 547, 548, 549, 550, 551, 552, 553, 554, 555, 556, 557, 558, 559, 560, 561, 562, 563, 564, 565, 566, 567, 568, 569, 570, 571, 572, 573, 574, 575, 576, 577, 578, 579, 580, 581, 582, 583, 584, 585, 586, 587, 588, 589, 590, 591, 592, 593, 594, 595, 596, 597, 598, 599, 600, 601, 602, 603, 604, 605, 606, 607, 608, 609, 610, 611, 612, 613, 614, 615, 616, 617, 618, 619, 620, 621, 622, 623, 624, 625, 626, 627, 628, 629, 630, 631, 632, 633, 634, 635, 636, 637, 638, 639, 640, 641, 642, 643, 644, 645, 646, 647, 648, 649, 650, 651, 652, 653, 654, 655, 656, 657, 658, 659, 660, 661, 662, 663, 664, 665, 666, 667, 668, 669, 670, 671, 672, 673, 674, 675, 676, 677, 678, 679, 680, 681, 682, 683, 684, 685, 686, 687, 688, 689, 690, 691, 692, 693, 694, 695, 696, 697, 698, 699, 700, 701, 702, 703, 704, 705, 706, 707, 708, 709, 710, 711, 712, 713, 714, 715, 716, 717, 718, 719, 720, 721, 722, 723, 724, 725, 726, 727, 728, 729, 730, 731, 732, 733, 734, 735, 736, 737, 738, 739, 740, 741, 742, 743, 744, 745, 746, 747, 748, 749, 750, 751, 752, 753, 754, 755, 756, 757, 758, 759, 760, 761, 762, 763, 764, 765, 766, 767, 768, 769, 770, 771, 772, 773, 774, 775, 776, 777, 778, 779, 780, 781, 782, 783, 784, 785, 786, 787, 788, 789, 790, 791, 792, 793, 794, 795, 796, 797, 798, 799, 800, 801, 802, 803, 804, 805, 806, 807, 808, 809, 810, 811, 812, 813, 814, 815, 816, 817, 818, 819, 820, 821, 822, 823, 824, 825, 826, 827, 828, 829, 830, 831, 832, 833, 834, 835, 836, 837, 838, 839, 840, 841, 842, 843, 844, 845, 846, 847, 848, 849, 850, 851, 852, 853, 854, 855, 856, 857, 858, 859, 860, 861, 862, 863, 864, 865, 866, 867, 868, 869, 870, 871, 872, 873, 874, 875, 876, 877, 878, 879, 880, 881, 882, 883, 884, 885, 886, 887, 888, 889, 890, 891, 892, 893, 894, 895, 896, 897, 898, 899, 900, 901, 902, 903, 904, 905, 906, 907, 908, 909, 910, 911, 912, 913, 914, 915, 916, 917, 918, 919, 920, 921, 922, 923, 924, 925, 926, 927, 928, 929, 930, 931, 932, 933, 934, 935, 936, 937, 938, 939, 940, 941, 942, 943, 944, 945, 946, 947, 948, 949, 950, 951, 952, 953, 954, 955, 956, 957, 958, 959, 960, 961, 962, 963, 964, 965, 966, 967, 968, 969, 970, 971, 972, 973, 974, 975, 976, 977, 978, 979, 980, 981, 982, 983, 984, 985, 986, 987, 988, 989, 990, 991, 992, 993, 994, 995,

at the time of the delivery of the coal, and this fact would not

"A party to a contract, upon discovery of the fact that he has been dealing with the agent of an unauthorized principal, may hold the latter liable in damages for any breach of the contract." *James v. Lewis*, 222 Ill. App. 410, 412, see also *Winkler v. Kohnstamm*, 22 Ill. App. 403, 404; *Bruck v. Kohnstamm*, 22 Ill. App. 411.

ALL INFORMATION CONTAINED HEREIN IS UNCLASSIFIED
DATE 08-01-00 BY 60322 UCBAW

in favor of plaintiff in the sum of \$100.00.

...THESE THINGS ARE ALL TRUE TO SWIMMING A BITE OF THE ...

● 附錄 20 臺灣省立美術館

Two items are on exhibit that in the case that court is
the identical from the other the sum of \$110.00.

36341

DOWNNEY COAL COMPANY,
a Corporation,
Appellant,

v.

EDYTHE SWARTZ and BETTY MOSKO,
Appellees.

79 A
APPEAL FROM MUNICIPAL
COURT OF CHICAGO.

270 I.A. 626⁵

MR. PRESIDING JUSTICE SCANLAW DELIVERED THE OPINION OF THE COURT.

Plaintiff sued defendants in the Municipal court of Chicago in contract for the sum of \$59.50. The case was tried by the court and the issues were found against plaintiff. Judgment was entered against plaintiff and in favor of defendants for costs and plaintiff has appealed. Defendants have not filed appearances nor a brief in this court.

This case, together with the preceding one (Downney Coal Co. v. Swartz, App. Ct. Gen. No. 36340, opinion handed down this date) and three other cases were all submitted to the trial court upon the one hearing. Plaintiff's statement of claim and defendants' affidavit of merits were similar to those in the preceding case and the sole defense was the same, and what we have said as to the law in that case applies with equal force to the instant one. It is not disputed that if defendants are liable the balance due plaintiff is \$59.50.

The judgment of the Municipal court of Chicago is reversed, with a finding of fact, and judgment is entered here in favor of plaintiff and against defendants in the sum of \$59.50.

REVERSED WITH A FINDING OF FACT
AND JUDGMENT HERE.

Gridley and Sullivan, JJ., concur.

IN THE COURT OF THE COMMON PLEAS
OF THE COUNTY OF CHICAGO

STATE OF ILLINOIS
vs.

JOHN J. KELLY and
JAMES J. KELLY

2701 A. 626

THE STATE OF ILLINOIS, by and through the undersigned Attorney General, do hereby certify that the within and foregoing is a true and correct copy of the original as the same appears in the records of the Court of the Common Pleas of the County of Chicago.

Plaintiff was appointed as the undersigned counsel in Chicago in connection with the case at (1894-95). The case was tried by the court and the issues were found against plaintiff. Judgment was entered against plaintiff and in favor of defendants for costs and plaintiff has appealed. Defendants have not filed appearance nor a brief in this court.

This case, removed with the provision for appeal from the Court of the Common Pleas to the Court of Appeals, is now pending in the latter court. The case was removed from the trial court upon the one motion. Plaintiff's statement of claim was returned. Plaintiff at once was advised to appear in the proceedings and the case was set for trial. The case was set for trial on the law in that case applied with equal force to the instant case. It is not disputed that if defendants are liable the balance due plaintiff is \$20.00.

The judgment of the Municipal Court of Chicago is reversed, with a finding of fact, and judgment is entered here in favor of plaintiff and against defendants in the sum of \$20.00.

WITNESSES MY HAND AND SEAL OF OFFICE
THIS 12th DAY OF MARCH, 1895.

WILLIAM J. KELLY, 33, County

36341

FINDING OF FACT.

We find as an ultimate fact in the case that there is due plaintiff from defendants the sum of \$59.50.

THE END OF THE WORLD

It is not a new thing to see the world in a new light.

There is no doubt that the world is a new thing.

110

36343

THE T. A. SNIDER PRESERVE COMPANY,
a Corporation, for the use of
HARTFORD ACCIDENT & INDEMNITY
COMPANY, a Corporation,

Appellant,

v.

THE PEOPLES TRUST & SAVINGS BANK
OF CHICAGO, a Corporation,

Appellee.

80 A
APPEAL FROM SUPERIOR
COURT, COOK COUNTY.

270 I.A. 627

MR. PRESIDING JUSTICE SCANLAN DELIVERED THE OPINION OF THE COURT.

The T. A. Snider Preserve Company, a corporation, for the use of Hartford Accident & Indemnity Company, a corporation, plaintiff, sued The Peoples Trust & Savings Bank of Chicago, a corporation, defendant, in assumpsit, to recover the sum of \$2,236.08, with interest. The case was tried before the court, with a jury, and at the conclusion of the evidence of both parties, upon motion of defendant, the court directed a verdict for defendant. Judgment was entered upon the verdict and an appeal followed. We reversed the judgment and remanded the cause. (The T. A. Snider Preserve Co. v. The Peoples Trust & Savings Bank of Chicago, (Abst.) 255 Ill. App. 619.) The case was then tried by the court, without a jury, and at the conclusion of all the evidence the court found the issues for defendant and judgment was entered upon the finding. Plaintiff has again appealed.

No point is made as to the pleadings and there is little, if any, conflict in the testimony. The T. A. Snider Preserve Company conducted a large business throughout the country. It employed from 250 to 300 salesmen, district managers, stock clerks and warehousemen, and, in addition, clerical help to the number of 150. It was a large depositor of defendant bank and on January 1,

THE F. A. SMITH TRUST COMPANY,
 a corporation, for the use of
 the F. A. SMITH TRUST COMPANY,
 a corporation,
 Appellant,
 v.
 THE PEOPLE TRUST & SAVINGS BANK
 OF CHICAGO, a corporation,
 Appellee.

APPEAL FROM DECISION
 OF THE COURT.

270 I.A. 627

MR. JUSTICE THOMAS delivered the opinion of the court.

The F. A. SMITH TRUST COMPANY, a corporation, for
 the use of the F. A. SMITH TRUST COMPANY, a corporation,
 Plaintiff, and The People Trust & Savings Bank of Chicago, a
 corporation, defendant, in assumpsit, to recover the sum of
 \$2,325.00, with interest. The case was tried before the court,
 with a jury, and at the conclusion of the evidence at both parties
 were motion of judgment. The court directed a verdict for defendant
 and judgment was entered upon the verdict and an appeal followed.
 We reversed the judgment and remanded the cause. (The F. A. SMITH
 TRUST COMPANY v. THE PEOPLE TRUST & SAVINGS BANK OF CHICAGO, (1901)
 100 Ill. App. 627.) The case was then tried by the court, without
 a jury, and at the conclusion of all the evidence the court found
 the issue for defendant and judgment was entered upon the finding.
 Plaintiff has again appealed.

No point is made as to the findings and there is little
 if any, conflict in the testimony. The F. A. SMITH TRUST
 COMPANY conducted a large business throughout the country. It
 employed from 100 to 200 employees, including managers, clerks, and
 messengers, and, in addition, obtained help as the number of
 120. It was a large depositor of defendant bank and on January 1,

1927, had a surplus balance of \$660,457.19. It employed Paul M. Hart as district sales manager for its Philadelphia territory and he engaged the salesmen, stenographers, warehousemen and truckmen for that district, approved their salaries and expense items, controlled the activities of these employees in general, and approved the salesmen's reports of sales and expense vouchers and sent the same to the Rochester office of the company, where pay checks, based on such sales reports, were then made out and sent to the payees thereof. Plaintiff claimed that between May 4, 1926, and December 6, 1926, Hart made out pretended sales reports of a fictitious person designated as "David Myron," giving his address at various hotels throughout the country, which reports were sent to the Rochester office together with other genuine reports for the purpose of having pay checks issued thereon by officers of the company, and that the officials who signed and countersigned the checks made payable to David Myron had no knowledge that the payee was a fictitious person; that Hart would then cash these checks at various places in the United States, and in some instances he secured personal indorsements while in others the checks bear the indorsement of the fictitious payee only. The alleged forged checks were in due course presented to defendant bank, upon which they were drawn, and it honored them and charged them against the account of the Snider company. The Hartford Accident & Indemnity Company had issued to that company a bond insuring it against dishonest acts of Hart, and when the alleged forgeries were discovered that company filed a claim against the Indemnity company for the amount of the alleged forged checks and the Indemnity company paid the claim in full.

Both parties submitted to the court a number of propositions of fact and of law, but no question has been raised by plaintiff in its brief or argument as to the court's action in reference

1927, had a surplus balance of \$800,457.10. It employed 2000 men.
Next an electric sales manager for the Philadelphia territory and
he secured the sales, transportation, maintenance and
for that district, approved their selection and expenses items, con-
sidered the selection of sales employees in general, and
the salesman's reports of sales and expense vouchers and sent the
same to the New York office of the company, where they checked,
based on such sales reports, were then made out and sent to the
New York office. Plaintiff claimed that between May 1, 1926, and
December 31, 1926, that was one hundred sales reports of a
plaintiff's sales reports included as "Lost Sales," which his sales
at various dates throughout the country, which reports were sent
to the New York office together with other genuine reports for
the purpose of having his checks passed by officers of
the company and that the officials who signed and transmitted
the checks were people he knew and he knew they were
given was a plaintiff's report that that would then mean there
checks at various places in the United States, and in some instances
he secured personal endorsements while in others the checks bear the
endorsement of the plaintiff's sales only. The alleged forged checks
were in the amount of \$100,000.00, which were then
transmitted, and it happened that one check against the account of
the United States. The plaintiff claimed that the company had
issued so that company a best invoice it against plaintiff's sales of
\$100,000.00, and when the alleged forged checks were discovered that company
that a claim against the plaintiff's company for the amount of the
alleged forged checks and the plaintiff's company paid the claim in
full.

With positive evidence to the court a number of propo-
sitions of fact and of law, but no question has been raised by plain-
tiff in the trial as to the court's action in refusing

to the same. The sole point raised by plaintiff is "that the court erred in its general finding, denying the plaintiff's right of recovery." Defendant contends: "First, that under the evidence the plaintiff has not proven that the endorsements of the payees' names were forged. Second, that even if the record had contained competent evidence that the names of the payees had been endorsed upon the checks by Paul M. Hart that the checks were paid to the very persons to whom the plaintiff primarily intended them to be paid. Third, (even if it be assumed only for the sake of argument that a forgery has been proved) that notice was not given to the defendant within a reasonable time after plaintiff learned these very facts which it now submits to the court as establishing the fact of forgery of the checks sued upon herein." Defendant has assigned cross-errors, viz: "The findings of fact by the court that there was no such person as David Myron and that the salesman's expense accounts bearing the name of David Myron were falsely and fraudulently prepared and submitted by Paul M. Hart for the purpose of deceiving and causing plaintiff to issue checks payable to David Myron, a non-existent person, and the holding of the court as a proposition of law that the endorsement of the name of David Myron on each of the checks was a forgery." Defendant states that "the assignment of these cross-errors is based upon defendant's contention that the court could not have made such findings of fact nor held that the endorsements on the checks were forgeries except by giving effect to certain incompetent, irrelevant, and immaterial evidence to which defendant had objected and for the admission of which defendant has assigned additional cross-errors."

Plaintiff had the burden of proving that the endorsements on the checks in question were forgeries, and it claims that it proved that David Myron was a fictitious person created by its employee Hart, and that the endorsement "David Myron" upon the

to the same. The sole point raised by Plaintiff is that the court
erred in its finding, denying the Plaintiff's right of
recovery. Defendant contends: "First, that under the evidence
the Plaintiff has not proven that the endorsement of the papers,
none were forged. Second, that even if the second had contained
correct evidence that the name of the paper had been endorsed
upon the checks by Paul M. Hunt that the checks were paid to the
very persons to whom the Plaintiff actually intended them to be
paid. Third, (even if it be assumed only for the sake of argument
that a forgery has been proved) that neither was not known to the
defendant within a reasonable time after Plaintiff received same
very facts which is now admitted as the point on which Plaintiff
lost of forgery of the checks need upon Plaintiff." Defendant has
submitted evidence that "The findings of fact by the court that
there was no such person as David Wynn and that the defendant's
signature appeared during the time of David Wynn were false and
falsely prepared and submitted by Paul M. Hunt for the purpose
of deceiving and causing Plaintiff to issue checks payable to David
Wynn, a non-existent person, and the holding of the court as to
proposition of law that the endorsement of the name of David Wynn
on each of the checks was a forgery." Defendant states that "the
assignment of these checks to the name of Defendant's contention
that the court could not have made such findings of fact nor held
that the endorsements on the checks were forgeries made by giving
evidence of certain independent, competent, and unimpaired evidence
to which effect he has objected and the violation of which
defendant has caused additional error-cause."

Plaintiff had the burden of proving that the instruments
on the checks in question were forged, and it claims that it
proved that David Wynn was a fictitious person created by the
employee Hunt, and that the instrument "David Wynn" upon the

back of each of the checks in question was a forgery. To prove its case in that regard plaintiff introduced a deposition of Leon B. Lewis, who testified that in March, 1927, he went to a house in Philadelphia to which the checks made payable to David Myron had been mailed and that he there interviewed the landlady of the place; that she told him that she did not have a roomer by the name of David Myron but that Hart did room with her and that when the letters addressed to Myron were received Hart told her that he would take them and deliver them to Myron, who was one of his salesmen. The witness was further allowed to testify that he had interviewed Hart and that the latter stated that Myron was a salesman who had worked for him in the Philadelphia territory; that "I told him I did not believe it; that I had made some investigations; and he then told me that he was badly - that he, personally, was badly in debt, he had lost money gambling, and had reported this salesman purely fictitious and had used the proceeds of our checks sent payable to David Myron." Defendant objected to the introduction of all this testimony "on the ground that it is incompetent, irrelevant, and immaterial and constitutes hearsay and it is not binding on the defendant in this case." The court, in ruling upon the objection, held that the testimony was incompetent to prove that Myron was a fictitious person and that the indorsements were forgeries, but he allowed the evidence to stand upon the ground that it might have a bearing upon the question of the alleged negligence of the Snider company in reporting the alleged forgery to the bank within a reasonable time. Certain witnesses were allowed to testify, over the objection of defendant, that they had heard or believed that Myron was a fictitious person, and in each case it appeared that the only knowledge of the witness on the subject was what someone else had told him or her. In view of the court's statements at the time he admitted this hearsay evidence, it is

book at each of the schools in question was a teacher. To prove
the case in this regard Plaintiff introduced a deposition of
James E. Lewis, who testified that in March, 1937, he went to a
house in Philadelphia in which the children were reported to reside
upon the first night and that he there interviewed the family
of the person that was said to have been a teacher by
the name of David Brown but that said person was not there and that
when the teacher returned to Brown was received that said man
that he would take them and deliver them to Brown, who was one of
his witnesses. The witness was further allowed to testify that he
had interviewed said man and that the latter stated that Brown was a
salesman who had worked for him in the Philadelphia territory;
that "I told him I did not believe it; that I had made some in-
vestigation and he then told me that he was really - that he
personally was really in 1937, he had lost money gambling, and had
reported this witness partly truthful and had used the proceeds
at an office and people in David Brown's - Defendant objected
to the introduction of all this testimony "on the ground that it
is incompetent, irrelevant, and immaterial and constitutes hearsay
and it is not binding on the defendant in this case." The court
in ruling upon the objection, said that the testimony was competent
to prove that Brown was a Philadelphia person and that the information
was material, and he allowed the evidence to stand upon the ground
that it might show a motive upon the part of the alleged negli-
gence of the United company in reporting the alleged injury to the
bank within a reasonable time. Certain witnesses were allowed to
testify over the objection of defendant, that they had heard or
believed that upon the first night Brown was in some way in-
volved in the only knowledge of the witness on the subject was
that witness also had told him or her. In view of the court's
findings at the time he admitted this hearsay evidence, it is

difficult to understand how he held, as a fact and as a proposition of law, that the indorsement of the name "David Myron" on each of the checks was a forgery. Defendant has assigned cross-error as to the admission of all of this hearsay testimony and strenuously and justly argues that we must disregard it in our consideration of this appeal. Plaintiff is forced to take the untenable position that the alleged statements of Hart to Lewis did not constitute hearsay evidence, "but, on the contrary, was competent evidence of a statement and admission by Hart, explanatory of matters that were peculiarly within Hart's sole knowledge, namely, that the name of the person 'David Myron' placed by Hart in the Sales Reports he sent in to his company was purely fictitious and that consequently there existed no such person," and that it was competent evidence and tended to prove in the strongest manner that the indorsements in question were forgeries. Counsel, of course, cites no cases in support of this argument. If plaintiff were suing Hart, or if Hart were being prosecuted in a criminal proceeding, his alleged admissions would, of course, be competent, but in the instant case they are not binding upon defendant. Plaintiff does not attempt to justify the evidence that Lewis gave as to the alleged statements of the landlady, nor the testimony of certain witnesses that they had heard or believed that Myron was a fictitious person. Of course, had the hearsay evidence been admitted without objection it would be given probative effect. The contention of defendant that plaintiff failed to establish, by competent evidence, a prima facie case of forgery of the indorsements of the payees' names on the checks in question must be sustained, and it follows, therefore, that plaintiff failed to make out a prima facie case against defendant.

It appears from the testimony of Jean Moore, assistant treasurer and assistant secretary of the Snider company, that she learned in December, 1926, of the alleged forgeries. In fact,

It is a fact that the instrument of the name "David Xerox" on each of the checks was a forgery. Defendant has retained possession of the checks of all of this money passing and defendant and the defendant argues that we must disregard it in our consideration of this case. Defendant is forced to take the material position that the alleged statements of David Xerox did not constitute money evidence, but, in the contrary, was competent evidence of a false statement and defendant by itself, separately of matters that were known by within David's sole knowledge, namely, that the name of the person "David Xerox" passed by him in New Orleans would be used in his company was merely financial and that defendant's name would be used in the company, and that it was competent evidence and should be given in the company's name that the instrument in question were forgeries. Defendant, of course, after no more in support of this argument. It is difficult to find that it was not a false statement in a criminal proceeding, his alleged statements would, of course, be competent, but in the instant case they are not binding on defendant. Defendant does not attempt to justify the evidence that David gave as to the alleged statements of the defendant, nor the testimony of certain witnesses that they had known or believed that Xerox was a fictitious person. Of course, had the money evidence been admitted without objection it would be given weight. The contention of defendant that defendant failed to establish by competent evidence, a prima facie case of forgery of the instruments of the money's names on the checks in question must be sustained, and is likewise, that defendant failed to establish that a prima facie case against defendant.

the trial court found "as a fact that the plaintiff had knowledge of the alleged loss claimed upon each of the checks in question in this case during the month of December, 1926," and plaintiff has not questioned in its brief nor argument the finding of the court in that regard. The first notice of the alleged forgeries given to defendant by the Snider company was by means of a letter dated June 4, 1927, mailed to defendant. Defendant contends that this failure of plaintiff to notify defendant within a reasonable time after plaintiff's discovery of the alleged forgeries is a bar to plaintiff's action, and it cites Findlay v. Corn Exchange Nat. Bank, 166 Ill. App. 57; First State Bank & Trust Co. v. First Nat. Bank of Canton, 314 Ill. 269, 273; Folsom v. Northern Trust Co., 237 Ill. App. 419; Continental Nat. Bank v. Metropolitan Nat. Bank, 107 Ill. App. 455, and also decisions of certain sister states, in support of its contention, but in the view that we have taken of this appeal we do not deem it necessary to decide this contention.

At the conclusion of the evidence defendant submitted to the court, inter alia, the following findings of fact, which were marked held: "XV. The court finds as a fact in this case that the primary intent of the drawer of the checks in question in this case, at the time they were issued, was to make said instruments payable to the person who signed the weekly expense accounts as 'David Myron' and to whom the drawer forwarded said instruments at the address given in said weekly expense accounts." "XVI. The court finds as a fact in this case that in the regular and usual course of its business the Snider Preserve Company received by mail from its district manager and sales agent, Paul M. Hart, certain documents entitled Salesman's 'Weekly Expense Account,' which said documents contained certain items for expenses and commissions earned on supposed sales; that said Salesman's 'Weekly Expense Accounts' bore at the bottom thereof, the signature 'David Myron',

the trial court found as a fact that the plaintiff had knowledge
of the alleged loss claimed upon each of the checks in question in
this case during the month of September, 1935, and plaintiff has
not questioned in its brief nor argued the timing of the report
in this regard. The first notice of the alleged forgery was given
to defendant by the writer company was by means of a letter dated
June 14, 1937, mailed to defendant. Defendant contends that this
failure of plaintiff to notify defendant within a reasonable time
after plaintiff's discovery of the alleged forgery is a bar to
plaintiff's action, and it cites Timber v. First National Bank,
124 Ill. App. 271; First National Bank v. First Nat. Bank,
24 Ill. App. 271; First Nat. Bank v. First Nat. Bank,
113 Ill. App. 271; First Nat. Bank v. First Nat. Bank,
107 Ill. App. 271, and the citation of certain cases cited in
evidence of the company, but in the view which we have taken of
this report we do not deem it necessary to decide this question.
As the conclusion of the evidence presented admitted to
the court, First Nat. Bank v. First Nat. Bank, which was
quoted in the briefs, the court finds as a fact in this case that the
primary intent of the drawer of the checks in question in this case,
of the time they were issued, was to make said instruments payable
to the person who signed the weekly expense account as "David
Spence", and to have the drawer furnished with instruments of the
nature of said weekly expense account. "AT". The court
finds as a fact in this case that in the regular and usual course
of the business the writer company received by mail from
the plaintiff company and sales agent, David Spence, certain
documents entitled defendant's "Weekly Expense Account", which said
documents contained therein the expenses and disbursements
incurred or supposed to have been incurred by said defendant's
agent, David Spence, as the person named in the account, "David Spence",

salesman, and also the legend and signature, 'Sales Agent OK Paul M. Hart'; that Salesman's 'Weekly Expense Accounts' also bore under the signature 'David Myron', an address purporting to be the address of said named David Myron; that the Snider Preserve Company issued the several checks herein sued upon, to the order of David Myron and mailed the same, addressed to David Myron, at the addresses given on the aforesaid Salesman's 'Weekly Expense Accounts,' in reliance upon and in conformity with said Salesman's 'Weekly Expense Accounts'; and that its primary intent when it issued and mailed the said checks was that the same should be paid to the person who, by means of said Salesman's 'Weekly Expense Accounts', reported that he was entitled to the amounts stated thereon and to whom it mailed the said checks." No question has been raised by plaintiff, either in its points and authorities or in its argument, as to these two findings, and defendant contends that under the facts thus found by the court the indorsements of the name "David Myron" upon the checks in question were not forgeries "inasmuch as the very person whom the maker primarily intended should receive and cash the same did so and, consequently, the defendant bank only paid the checks drawn upon it in accordance with the tenor of said instruments." In support of this contention defendant cites a number of cases. In the course of its argument defendant asserts that even if plaintiff's theory of fact had been sustained by competent evidence the acts of Hart, under the circumstances, would not have constituted forgery but would have amounted to obtaining money by false pretenses. We do not deem it necessary to pass upon this contention.

The judgment of the Superior court of Cook county is affirmed.

AFFIRMED.

Gridley and Sullivan, JJ., concur.

36350

GORDON C. THORNE,
Appellant,

v.

THE FOREMAN-STATE TRUST &
SAVINGS BANK, a corp., by
consolidation with the
FOREMAN TRUST & SAVINGS BANK,
a corp., and THE STATE BANK
OF CHICAGO, a corporation,
Appellees.

APPEAL FROM MUNICIPAL
COURT OF CHICAGO.

270 I.A. 627²

MR. PRESIDING JUSTICE SCANLAN DELIVERED THE OPINION OF THE COURT.

Plaintiff sued defendant in the Municipal court of Chicago in a first class action. A jury returned a verdict finding the issues against plaintiff, judgment was entered upon the verdict and plaintiff has appealed.

The statement of claim alleges that defendant is a banking corporation; that plaintiff has had, since January 15, 1920, on general deposit with the State Bank of Chicago, subject to withdrawal on demand, the sum of \$2,060.61; that on May 25, 1920, he drew a check to his own order in that sum and presented the same to the said bank on August 5, 1920, but that the said bank refused to accept the check or pay the same; that on January 16, 1920, and at divers times thereafter the said bank, by its attorney and assistant secretary, acknowledged that it held the said sum of \$2,060.61 on general deposit to the credit and for the account of plaintiff, subject to a certain alleged check, dated October 23, 1919, to the order of "Cash," in the sum of \$2,000, drawn on it and alleged to have been signed by plaintiff, which check the said officials stated had been paid to the holder about December 12, 1919; that the alleged check was neither drawn,

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Journal of Management Studies, 1987, 20(6), 611-621

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STO. LOUIS

ALL INFORMATION CONTAINED HEREIN IS UNCLASSIFIED

The first of these is the fact that the
 Government has been unable to obtain
 the necessary information from the
 various sources which it has
 been using to obtain this
 information.

The statement of certain alleged check statements is a
 banking corporation; that plaintiff has had, since January 1934,
 1935, on General account with the State Bank of Chicago, subject
 to withdrawal on demand, the sum of \$2,000.00, that on May 1935,
 1935, he drew a check to his own order in that sum and presented
 the same to the said bank on August 6, 1935, but that the said
 bank refused to accept the check or pay the same and on January
 15, 1936, and at various times thereafter the said bank, by its
 attorney and managing secretary, acknowledged that it held the
 said sum of \$2,000.00 on General deposit to the credit and for
 the account of plaintiff, subject to a certain alleged check,
 dated October 22, 1935, in the order of "Cash", in the sum of
 \$2,000, drawn on it and alleged to have been signed by plaintiff,
 which check the said attorney stated had been paid in the whole

signed, nor executed by plaintiff, nor by any person with his authority, and that plaintiff has at no time acknowledged or ratified the said check, or accepted responsibility therefor in any manner whatsoever, but, on the contrary, plaintiff notified the said bank that the said check did not bear his signature, and that the signature thereto was a forgery and affixed without his knowledge or authority; that on October 29, 1919, the said bank informed plaintiff that the said alleged check had been presented to it for payment and requested plaintiff to inform it whether or not it should be paid, that he then and there informed the said bank that the said check should not be paid and that thereupon the said defendant refused to pay the said check on said date; that the said bank was then and there placed upon notice that the said check was not a valid obligation of plaintiff and that plaintiff had disclaimed liability thereon, and it then and there became the duty of the bank to refuse to honor the said alleged check when again presented for payment, but the said bank, not regarding its duty, afterward, on December 12, 1919, paid the said check; "wherefore, the plaintiff alleges that the State Bank of Chicago is indebted to him in the sum of \$2,060.61, together with lawful interest upon \$2,000 of said amount from January 16, 1920 * * *;" that the said bank was consolidated with the Foreman Trust & Savings Bank as of December 14, 1929, under the title of The Foreman-State Trust & Savings Bank, and under section 12 of the State Banking act the said The Foreman-State Trust & Savings Bank assumed all liabilities of the consolidated banking corporations.

The material part of the affidavit of merits sets up that "in the regular course of business it honored a check dated October 28, 1919, to the order of 'Cash' in the sum of \$2,000, drawn on the defendant (State Bank of Chicago) and signed and executed by the plaintiff, and that the defendant denies that

signed, nor executed by plaintiff, nor by any person with his
 authority, and that plaintiff has at no time acknowledged or
 ratified the said check, or assumed responsibility therefor in
 any manner whatsoever, but, on the contrary, plaintiff notified
 the said bank that the said check did not bear his signature, and
 that the signature thereon was a forgery and attested witness his
 knowledge on said date. That on October 22, 1913, the said bank
 informed plaintiff that the said alleged check had been presented
 to it for payment and requested plaintiff to advise it whether or
 not it should be paid, that he then and there informed the said
 bank that the said check should not be paid and that thereupon
 the said defendant refused to pay the said check on said date;
 that the said bank was then and there placed upon notice that the
 said check was not a valid obligation of plaintiff and that plaintiff
 did not disavow liability thereon, and it then and there became
 the duty of the bank to refuse to honor the said alleged check when
 again presented for payment, but the said bank, not refusing the
 same, on November 12, 1913, paid the said check; where-
 upon, the plaintiff alleges that the State Bank of Chicago is indebted
 to him in the sum of \$2,000.00, together with interest thereon upon
 \$2,000 of said amount from January 12, 1914 to * * * that the said
 bank was reimbursed with the payment from a certain bank on the
 December 12, 1913, under the title of the payment from a
 certain bank, and under section 12 of the State Banking and the
 said the payment from a certain bank covered all liabilities
 of the consolidated banking corporations.
 The material part of the affidavit of recitals now on
 file "in the regular course of business it honored a check dated
 October 22, 1913, to the order of 'Cash' in the sum of \$2,000.
 drawn on the defendant (State Bank of Chicago) and signed and
 executed by the plaintiff, and that the defendant admits that

the plaintiff has not acknowledged or ratified the said check or acknowledged responsibility therefor in any manner, and denies that it was notified prior to the cashing thereof that the said check did not bear the signature of the plaintiff, and denies that the signature was a forgery; and denies that it was, prior to the honoring thereof, notified that the signature was a forgery or that the signature was affixed without the knowledge or authority of the plaintiff." Defendant also filed a plea of the Statute of Limitations. To this plea plaintiff filed a replication that the instant suit was begun within one year after a prior action had been dismissed for want of prosecution. It appears that plaintiff, on August 5, 1930, instituted an action against State Bank of Chicago, which was dismissed for want of prosecution on June 8, 1931, and that the present action was commenced on October 29, 1931.

Defendant has assigned certain cross-errors and in support of the same strenuously argues that the trial court erred in refusing to direct a verdict for defendant at the close of plaintiff's case and at the close of all of the evidence, and also that the court erred in failing and refusing to direct a verdict for defendant upon defendant's plea of the Statute of Limitations. In the view that we have taken of this appeal we deem it unnecessary to pass upon the merits of the cross-errors.

Plaintiff contends that "the verdict is against the manifest weight of the evidence." After reading the entire transcript of the evidence we are satisfied that the instant contention is without merit. In fact, we find ourselves in full accord with the verdict.

Plaintiff contends that the court erred in instructing the jury, at the instance of defendant, that the burden was upon plaintiff to prove that the disputed \$2,000 check was a forgery. The following is the material part of the charge to the jury:

The Plaintiff has not submitted to the Court any evidence or testimony in support of her claim that the defendant is responsible for the injury to her child. It was noticed that in the evidence submitted by the defendant it was stated that the child was not born the daughter of the Plaintiff, and that she was a foreigner and that it was not until after the birth of the child that the Plaintiff discovered that the child was not her daughter. The Plaintiff also filed a plan of the estate of the defendant. To this the defendant filed a rejoinder in which she stated that the child was born within one year after a prior action had been dismissed for want of prosecution. It appears that Plaintiff, on March 1, 1901, instituted an action against the defendant, which was dismissed for want of prosecution on June 2, 1901, and that the present action was commenced on October 22, 1901.

The defendant has assigned certain reasons why she is entitled to the same exclusively against the child and also in relation to the child as defendant at the time of Plaintiff's case. It is stated that defendant at the time of Plaintiff's case and at the time of all of the evidence, and also that the court erred in failing to return a verdict in favor of the defendant upon the issue as to the date of the birth of the child. In the view that we have taken of this appeal we deem it unnecessary to pass upon the merits of the cross-examination.

The defendant contends that "the verdict is against the plaintiff as to the issue of the evidence." It is stated that the evidence we are satisfied that the defendant's contention is without merit. In fact, we find ourselves in full accord with the plaintiff. The defendant's contention that the child was born in 1900 is not supported by the evidence of defendant, and the burden was upon Plaintiff to prove that the child was a foreigner. The following is the material part of the charge to the jury:

"The Court: The court further instructs you gentlemen of the jury that unless the plaintiff has proved by a preponderance of the evidence that the disputed \$2,000 check is a forgery, then you must find the issues for the defendant. The law requires the plaintiff to establish his case by a preponderance or greater weight of the evidence before he can recover. If he has not so established his case, or if the evidence is so evenly balanced so that you are in doubt or unable to say on which side is the preponderance of the evidence, or if the evidence preponderates in favor of the defendant, then in either of these cases you should find the issues for the defendant.

"To the giving of each and every one of which the plaintiff by his counsel duly excepted.

"Whereupon the Court, at the request of counsel for the plaintiff, gave the following instructions on behalf of the plaintiff:

"The Court: The court instructs the jury that the burden of proof to show that the signature on the check in the sum of \$2,000, dated October 28, 1919, which was paid and charged to the plaintiff, if you find that the bank did pay said check and charged the amount thereof to the plaintiff, is the genuine signature of Gordon C. Thorne, is upon the defendant bank. The relation of bank and depositor is that of debtor and creditor. Out of that relation the law implies a contract on the part of the bank to pay the depositor's checks to the amount of his deposit to the persons to whom he orders payment to be made. No amount of care to avoid error will protect a bank from liability, if it fails to ascertain and act upon the genuineness of the depositor's signature. In this case, if you find from the evidence that the State Bank of Chicago paid the amount of the check of \$2,000, dated October 28, 1919, and charged said amount to the depositor, and if you further find from the evidence that the alleged signature to said check is a forgery, then the defendant bank is liable.

" * * * "

"To the giving of each and every one of which the defendant, by its counsel, ^{duly} excepted."

Plaintiff states that the aforesaid part of the charge given at his instance correctly states the law, but that the aforesaid part given at the instance of defendant contains an erroneous statement of the law, and argues that the jury was undoubtedly confused by the two statements, to the prejudice of plaintiff. It may be conceded that the first sentence of the part of the charge given at the instance of defendant contained an erroneous statement of the law, but we do not think that plaintiff is in a position to complain of the error. Rule 3 of the Municipal court of Chicago requires that "objections to the giving or refusing of oral instructions to the jury must be specific

and must be made immediately upon the conclusion of the charge and before the jury retire," and this rule is, of course, enforced in the Appellate courts. Many cases might be cited wherein we have enforced it. That counsel for plaintiff failed to make any specific objection to the charge at the conclusion of the same is apparent from the record. In fact, the record fails to show that any objection was made to it. Had plaintiff, at the conclusion of the charge and before the jury retired, called the attention of the court to the error in the charge, the court, undoubtedly, would have cured it.

Plaintiff contends that the court erred in admitting in evidence a check for \$100, dated December 31, 1919, drawn on the State Bank of Chicago, payable to the order of "Cash," and purporting to have been signed by plaintiff, but which plaintiff denied executing. While the evidence for defendant tended to prove that plaintiff signed that check, the evidence for plaintiff sustained his contention that he had not signed it, and therefore it was not properly admissible under par. 50, ch. 51, Cahill's Ill. Rev. St. 1931. In the instant case the parties agreed that a series of checks and other writings were made by plaintiff and might be used as a standard of comparison, and while it is true that plaintiff objected to the introduction of the check for \$100, the signature to this check, together with eleven admitted signatures of plaintiff, were all included in defendant's exhibit eight, which was an "enlarged photograph of these signatures," and which was admitted in evidence without objection. Later, counsel for plaintiff stated "that there was no objection to the exhibit with the exception of the one signature," viz., the signature to the \$100 check. But counsel did not ask that the entire exhibit be withheld from the jury nor did he ask that the signature to the \$100 check be eliminated from the exhibit. In our judgment the admission of the \$100 check did not

prejudice plaintiff. Witnesses for defendant testified that if that check were entirely eliminated from consideration they would still insist that the person who wrote the other "standard genuine signatures" wrote the signature on the check for \$2,000. We entirely agree with their conclusion in that regard. When all of the evidence that plaintiff concedes is competent is carefully considered in the light of the surprising testimony of plaintiff, we are unable to see how a jury could justly find a verdict for plaintiff.

The judgment of the Municipal court of Chicago is affirmed.

AFFIRMED.

Gridley and Sullivan, JJ., concur.

36359

FRED A. SPANDAU,
Appellee,

v.

RALPH CARAZZA,
Appellant.

APPEAL FROM MUNICIPAL COURT
OF CHICAGO.

270 I.A. 627³

MR. PRESIDING JUSTICE SCARLAN DELIVERED THE OPINION OF THE COURT.

Fred A. Spandau, plaintiff, on March 18, 1932, filed a distress warrant against Ralph Carazza, defendant, in which it was alleged that the sum of \$285 was due on March 1, 1932, for rent of the premises known as the ground floor store, 700 South Dearborn street, demise to defendant by plaintiff. The case was tried by the court, who found "the issue as to the right of plaintiff to levy the distress warrant in this cause and as to the merits of the action against the defendant Ralph Carazza and assesses the plaintiff's damages at the sum of \$285." Judgment was entered upon the finding and defendant prayed an appeal. An appeal bond was approved and filed. Defendant was allowed sixty days in which to file a bill of exceptions but none was ever filed and we have before us only the common law record.

Defendant has raised several contentions, all of which are of the most technical character.

Defendant contends that the distress warrant shows one name and the summons or process another, and that such variance is fatal. The record fails to show that defendant raised the question of the alleged variance. It appears that the distress warrant and the judgment order designate defendant by the name of Ralph Carazza, while the summons in distress and the return to the same designate defendant as Ralph J. Carazza. The record shows that the right defendant was served, that he appeared in the proceedings in person

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The evidence shows that the person who was in the car at the time of the shooting was the person who was in the car at the time of the shooting.

THE UNIVERSITY OF CHICAGO PRESS

1. The first of these is the fact that the majority of the population of the United States is of European descent. This is a fact which has been recognized by the government and the people of the United States for many years. It is a fact which has been recognized by the government and the people of the United States for many years.

Revised and Formatted. * 4444 In the year 1880, the population of Illinois

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the date of your whole business now conducted in the New York office now

and the fact that the same was not done in the case of the other two.

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and by attorney and that he failed to raise in any apt way the question of the alleged misnomer. In I. C. R. R. Co. v. Hasenwinkle, 232 Ill. 224, 226, the court said:

"So far as the error in the middle initial is concerned, the law is that a middle letter is no part of the name of an individual, and if it is omitted, wrongly inserted or erroneous, it makes no difference. The common law recognizes but one Christian name, and a middle initial may be dropped or resumed or changed at pleasure. Its presence or absence or difference affects nothing. (Gross v. Village of Crossdale, 177 Ill. 248; Claffin v. City of Chicago, 178 id. 549.)" (Italics ours.)

The present contention is without the slightest merit.

Defendant contends that the distress warrant is the declaration in the case and that it "is defective and insufficient inasmuch as it fails to show to whom and where it was served". Service of distress warrant must be made on the party named as defendant, or tenant, or to any party authorized by law. The amount claimed by appellee in his alleged distress warrant was for rent of a store and service should be made either to the party himself or to any other party who is in possession or control of the premises in which the property restrained is located." Defendant does not contend that he did not receive a copy of the distress warrant. In fact, as we have heretofore stated, he appeared in person and by counsel and took part in the entire proceedings. The distress warrant served him with notice of his right to file a schedule of all of his property, and to claim any exemptions to which he might deem himself entitled. The record fails to show that there was a sale of the property seized, or that defendant scheduled and claimed exemptions at any time, or that defendant has been damaged or deprived of any of his rights. Defendant has seen fit to state, in his brief, that the property involved in the instant case has been replevied, in another action, by him and he offers to submit to this court the record in the alleged replevin case, and he argues that the alleged replevin suit

deprived the court of all jurisdiction to determine any issue in the instant case. The record is entirely silent as to the alleged replevin suit, but if it showed such an action and that the personal property involved in the instant proceedings had been replevied, such fact would not deprive the court of all jurisdiction in the instant case, as defendant argues.

The judgment order in the instant case shows that defendant was before the court in person and by counsel, that the cause came on in regular course for trial and that the court heard the evidence and the arguments of counsel before rendering judgment. Defendant, in so far as the record discloses, has had a fair and impartial trial, and the judgment of the Municipal court of Chicago will be affirmed.

AFFIRMED.

Gridley and Sullivan, JJ., concur.

deprived the court of all jurisdiction to determine any issue in the instant case. The record is entirely silent as to the alleged negative suit, but it is shown from an action and that the personal property involved in the instant proceedings had been retained, which fact would not deprive the court of all jurisdiction in the instant case, as previously stated.

The judgment given in the instant case shows that defendant was before the court in person and by counsel, that the cause came on in regular course for trial and that the court heard the evidence and the arguments of counsel before rendering judgment. Defendant, in so far as the record discloses, has had a fair and impartial trial, and the judgment of the Municipal Court of Chicago will be affirmed.

ADMINISTRATIVE.

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36389

ANN MATTHEWS,
Appellee,

v.

F. FRAZIER JELKE,
ALEXANDER M. MAIN,
O. H. WIGGS, SIDNEY S.
WHEELER, JOHN J. MOORE,
VICTOR G. PARADISE, GEORGE
L. BRAEBEN, WALTER H.
CHURCH, J. HALLAM BOYD,
copartners doing business
as FRAZIER JELKE & CO.,
Appellants.

APPEAL FROM SUPERIOR

COURT OF COOK COUNTY.

270 I.A. 627⁴

MR. PRESIDING JUSTICE SCANLAN DELIVERED THE OPINION OF THE COURT.

Plaintiff sued defendants in assumpsit. A jury returned a verdict finding the issues for plaintiff and assessing her damages at the sum of \$1,820. Judgment was entered upon the verdict and defendants have appealed.

The declaration consisted of the common counts. Defendants filed the plea of the general issue.

Defendants are stock brokers, and prior to September 24, 1929, plaintiff's son, Charles Matthews, had an account with them. On or about the last mentioned date plaintiff went to the office of defendants and ordered one of the latter's employees to purchase 80 shares of Middle West Utilities stock on margin and she handed to the employee a \$1,000 bond to be used as collateral. She claimed that she told the employee that she was purchasing the stock and that she did not want her son to know of the transaction as he had told her not make any investments while he was out of the city. Plaintiff testified that her son, at the time in question, was about twenty-two years of age and had been going to school until September, 1929; that he lived with her, and that she and her son had "a joint box at the bank." Defendants claimed that

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• Venerable Minister of the Interior and Secretary of the Interior

One father and two brothers are mentioned. (1945, 1) To sum up:

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and acknowledged of being his, and that those are admitted.

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plaintiff gave specific orders that the transaction was to be carried in the account of her son; "that she wanted - she told me that she wanted all in her son's account, because it was all her money anyway. Her son had never worked except odd jobs, and had no money. It all belonged to her anyway." The son testified that the bonds that were put up as collateral belonged to his father's estate; that the father had left no will and the estate had never been probated. During his examination the following occurred: "Mr. Bourland (attorney for defendants): "those bonds were they, Mr. Matthews? A. Well, they would be - practically, if you want to call it, a partnership, perhaps. Q. What partnership? A. Between my mother and myself. Q. The bonds had been kept in a joint box, had they, in the First National Bank Building? A. Yes, sir." It is a matter of common knowledge that the stock market had a very severe decline in the fall of 1929. On October 24, 1929, defendants required further collateral and plaintiff left with them an additional \$1,000 bond. She testified that she never received a receipt for either of the bonds. Defendants introduced carbon copies of the receipts given for the two bonds. Each recites that defendants received the bond from Charles Matthews. After October 24, 1929, the market continued to decline and defendants sent notices to Charles Matthews to bring in additional margin. Receiving no word from him they sold, on October 31, 1929, one of the bonds for \$391.17, which was the highest and best price that could be secured at the time on the market; and on November 4, 1929, they sold the other bond for \$906.83, which was also the highest and best price that could then be obtained. After the sale of the two bonds defendants sent two checks to Charles Matthews, one for \$68.77 and the other for \$45. The first check represented the balance of his account with defendants, and the second represented

plaintiffs gave specific orders that the transaction was to be
settled in the account of her son; that she wanted - she said
no that she wanted all in her son's account, because it was all
her money anyway. Her son had never worked except odd jobs, and
had no money. It all belonged to her anyway. The son testified
that the bonds that were put up as collateral belonged to his
father's estate; that the father had left no will and the estate
had never been probated. During his examination the following
accounted: "Mr. Defendant (attorney for defendant): Those bonds
were they, Mr. Defendant? A. Well, they would be - possibly. If
you want to call it a partnership, perhaps. A. That partnership
is between my mother and myself. A. The bonds had been kept in
a safe box, had they, in the Trust National Bank Building?
Yes, sir. It is a matter of common knowledge that the stock
market had a very severe decline in the fall of 1929. On October
21, 1929, defendant received further evidence and plaintiff left
with them an additional \$1,000 bond. He testified that she never
received a receipt for either of the bonds. Defendant introduced
certain copies of the receipts given for the two bonds. Each
receipt that defendant received the bond from Charles Matthews.
After October 24, 1929, the market continued to decline and defendant
sent some notice to Charles Matthews to bring in additional margin.
Receiving no word from him they sold, on October 31, 1929, one of
the bonds for \$201.17, which was the highest and best price that
could be secured at the time on the market; and on November 4, 1929,
they sold the other bond for \$208.82, which was also the highest
and best price that could then be obtained. After the sale of
the two bonds defendant sent two checks to Charles Matthews, one
for \$201.17 and the other for \$208.82. The first check represented
the balance of his account with defendant, and the second represented

payment for two interest coupons on two other bonds which he had previously deposited with defendants. Charles Matthews admitted receiving both of these checks and that he understood that the one for \$68.77 was for the balance of his account and the other for the payment of the two coupons. He cashed both checks and retained the money. Plaintiff claimed that the two bonds were sold without her knowledge or consent and without due notice to her; that she did not read the letters that had been sent to her son which called for additional margin, and that she was not aware that the bonds had been sold until her son notified her of that fact about November 1, 1929.

Defendants have raised and argued nine points in support of their contention that the judgment should be reversed. In the view that we have taken of this appeal it is necessary for us to consider but one.

Defendants contend that the verdict is contrary to the manifest weight of the evidence. In considering this contention we have read the entire evidence adduced upon the trial and after a very careful consideration of the same we have reached the conclusion that the contention of defendants is a meritorious one. As this case may be tried again we refrain from analyzing and commenting upon the facts and circumstances in evidence.

The judgment of the Superior court of Cook county is reversed and the cause is remanded.

REVERSED AND REMANDED.

Gridley and Sullivan, JJ., concur.

...for the interest upon the two other bonds which he had
previously deposited with defendant. Charles Matthews admitted
receipt of the two bonds and that he understood that the sum
for \$25.00 was for the balance of his account and the other for
the payment of the two coupons. He further admitted that the two bonds were sold
without his knowledge or consent and without his notice so that
that the two bonds were sold without his knowledge or consent so that
which called for additional money, and that she was not aware that
the bonds had been sold until her own notified her of the fact

about November 1, 1907.

Defendants have raised and argued nine points in support
of their contention that the judgment should be reversed. In the
view that we have taken of this appeal it is necessary for us to
consider but one.

Defendants contend that the verdict is contrary to the
manifest weight of the evidence. In considering this contention
we have read the entire evidence shown upon the trial and after
a very careful consideration of the same we have reached the con-
clusion that the contention of defendants is a meritless one.
In this case we have again we refrain from analyzing and
commenting upon the facts and circumstances in evidence.

The judgment of the Superior Court of Cook County is
reversed and the case is remanded.

WILLIAM H. HARRIS,

Attorney and Counsel, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 47, 48, 49, 50, 51, 52, 53, 54, 55, 56, 57, 58, 59, 60, 61, 62, 63, 64, 65, 66, 67, 68, 69, 70, 71, 72, 73, 74, 75, 76, 77, 78, 79, 80, 81, 82, 83, 84, 85, 86, 87, 88, 89, 90, 91, 92, 93, 94, 95, 96, 97, 98, 99, 100, 101, 102, 103, 104, 105, 106, 107, 108, 109, 110, 111, 112, 113, 114, 115, 116, 117, 118, 119, 120, 121, 122, 123, 124, 125, 126, 127, 128, 129, 130, 131, 132, 133, 134, 135, 136, 137, 138, 139, 140, 141, 142, 143, 144, 145, 146, 147, 148, 149, 150, 151, 152, 153, 154, 155, 156, 157, 158, 159, 160, 161, 162, 163, 164, 165, 166, 167, 168, 169, 170, 171, 172, 173, 174, 175, 176, 177, 178, 179, 180, 181, 182, 183, 184, 185, 186, 187, 188, 189, 190, 191, 192, 193, 194, 195, 196, 197, 198, 199, 200, 201, 202, 203, 204, 205, 206, 207, 208, 209, 210, 211, 212, 213, 214, 215, 216, 217, 218, 219, 220, 221, 222, 223, 224, 225, 226, 227, 228, 229, 230, 231, 232, 233, 234, 235, 236, 237, 238, 239, 240, 241, 242, 243, 244, 245, 246, 247, 248, 249, 250, 251, 252, 253, 254, 255, 256, 257, 258, 259, 260, 261, 262, 263, 264, 265, 266, 267, 268, 269, 270, 271, 272, 273, 274, 275, 276, 277, 278, 279, 280, 281, 282, 283, 284, 285, 286, 287, 288, 289, 290, 291, 292, 293, 294, 295, 296, 297, 298, 299, 300, 301, 302, 303, 304, 305, 306, 307, 308, 309, 310, 311, 312, 313, 314, 315, 316, 317, 318, 319, 320, 321, 322, 323, 324, 325, 326, 327, 328, 329, 330, 331, 332, 333, 334, 335, 336, 337, 338, 339, 340, 341, 342, 343, 344, 345, 346, 347, 348, 349, 350, 351, 352, 353, 354, 355, 356, 357, 358, 359, 360, 361, 362, 363, 364, 365, 366, 367, 368, 369, 370, 371, 372, 373, 374, 375, 376, 377, 378, 379, 380, 381, 382, 383, 384, 385, 386, 387, 388, 389, 390, 391, 392, 393, 394, 395, 396, 397, 398, 399, 400, 401, 402, 403, 404, 405, 406, 407, 408, 409, 410, 411, 412, 413, 414, 415, 416, 417, 418, 419, 420, 421, 422, 423, 424, 425, 426, 427, 428, 429, 430, 431, 432, 433, 434, 435, 436, 437, 438, 439, 440, 441, 442, 443, 444, 445, 446, 447, 448, 449, 450, 451, 452, 453, 454, 455, 456, 457, 458, 459, 460, 461, 462, 463, 464, 465, 466, 467, 468, 469, 470, 471, 472, 473, 474, 475, 476, 477, 478, 479, 480, 481, 482, 483, 484, 485, 486, 487, 488, 489, 490, 491, 492, 493, 494, 495, 496, 497, 498, 499, 500, 501, 502, 503, 504, 505, 506, 507, 508, 509, 510, 511, 512, 513, 514, 515, 516, 517, 518, 519, 520, 521, 522, 523, 524, 525, 526, 527, 528, 529, 530, 531, 532, 533, 534, 535, 536, 537, 538, 539, 540, 541, 542, 543, 544, 545, 546, 547, 548, 549, 550, 551, 552, 553, 554, 555, 556, 557, 558, 559, 560, 561, 562, 563, 564, 565, 566, 567, 568, 569, 570, 571, 572, 573, 574, 575, 576, 577, 578, 579, 580, 581, 582, 583, 584, 585, 586, 587, 588, 589, 590, 591, 592, 593, 594, 595, 596, 597, 598, 599, 600, 601, 602, 603, 604, 605, 606, 607, 608, 609, 610, 611, 612, 613, 614, 615, 616, 617, 618, 619, 620, 621, 622, 623, 624, 625, 626, 627, 628, 629, 630, 631, 632, 633, 634, 635, 636, 637, 638, 639, 640, 641, 642, 643, 644, 645, 646, 647, 648, 649, 650, 651, 652, 653, 654, 655, 656, 657, 658, 659, 660, 661, 662, 663, 664, 665, 666, 667, 668, 669, 670, 671, 672, 673, 674, 675, 676, 677, 678, 679, 680, 681, 682, 683, 684, 685, 686, 687, 688, 689, 690, 691, 692, 693, 694, 695, 696, 697, 698, 699, 700, 701, 702, 703, 704, 705, 706, 707, 708, 709, 710, 711, 712, 713, 714, 715, 716, 717, 718, 719, 720, 721, 722, 723, 724, 725, 726, 727, 728, 729, 730, 731, 732, 733, 734, 735, 736, 737, 738, 739, 740, 741, 742, 743, 744, 745, 746, 747, 748, 749, 750, 751, 752, 753, 754, 755, 756, 757, 758, 759, 760, 761, 762, 763, 764, 765, 766, 767, 768, 769, 770, 771, 772, 773, 774, 775, 776, 777, 778, 779, 780, 781, 782, 783, 784, 785, 786, 787, 788, 789, 790, 791, 792, 793, 794, 795, 796, 797, 798, 799, 800, 801, 802, 803, 804, 805, 806, 807, 808, 809, 810, 811, 812, 813, 814, 815, 816, 817, 818, 819, 820, 821, 822, 823, 824, 825, 826, 827, 828, 829, 830, 831, 832, 833, 834, 835, 836, 837, 838, 839, 840, 841, 842, 843, 844, 845, 846, 847, 848, 849, 850, 851, 852, 853, 854, 855, 856, 857, 858, 859, 860, 861, 862, 863, 864, 865, 866, 867, 868, 869, 870, 871, 872, 873, 874, 875, 876, 877, 878, 879, 880, 881, 882, 883, 884, 885, 886, 887, 888, 889, 890, 891, 892, 893, 894, 895, 896, 897, 898, 899, 900, 901, 902, 903, 904, 905, 906, 907, 908, 909, 910, 911, 912, 913, 914, 915, 916, 917, 918, 919, 920, 921, 922, 923, 924, 925, 926, 927, 928, 929, 930, 931, 932, 933, 934, 935, 936, 937, 938, 939, 940, 941, 942, 943, 944, 945, 946, 947, 948, 949, 950, 951, 952, 953, 954, 955, 956, 957, 958, 959, 960, 961, 962, 963, 964, 965, 966, 967, 968, 969, 970, 971, 972, 973, 974, 975, 976, 977, 978, 979, 980, 981, 982, 983, 984, 985, 986, 987, 988, 989, 990, 991, 992, 993, 994, 995, 996, 997, 998, 999, 1000.

36183

ALBERT F. KEMNEY and
HARRIET MAYNE KEMNEY,
Plaintiffs in Error,

v.

MILO G. REICHARD and
ALVINA REICHARD,
Defendants in Error.

ERROR TO MUNICIPAL
COURT OF CHICAGO.

270 I.A. 628

MR. JUSTICE GRILEY DELIVERED THE OPINION OF THE COURT.

In a first class action in assumpsit for damages for breach by defendants of a written contract, there was a trial without a jury in June, 1932, resulting in the court finding the issues against plaintiffs and entering judgment against them for costs. By this writ of error they seek to reverse the judgment.

In plaintiffs' statement of claim, filed April 15, 1932, they alleged that pursuant to the terms of a written contract, dated December 14, 1929 (copy attached and made a part of the statement) defendants agreed to purchase of them certain improved Chicago real estate (describing it); that by the contract defendants agreed to pay for the premises the total sum of \$9,000, "by assuming a \$4,500 first mortgage then upon the premises and by the payment of the sum of \$4,500, in monthly installments of \$70 or more, commencing January 15, 1930, and continuing thereafter on the 15th day of each and every month succeeding, until the entire balance remaining on the principal sum should be paid with interest thereon at the rate of 6 per cent per annum;" that thereafter and until and including December 15, 1931, defendants made the required monthly payments; that on January 15, 1932, they failed to pay the installment then due, and also thereafter failed to pay the installments due on February 15th and March

15th, 1932; that in January, 1932, defendants, then in possession, moved out and abandoned the premises; that in January, 1932, the market value thereof was \$7,290; that there was payable on the contract the sum of \$8,286.92; that plaintiffs "were thereby damaged to the extent of \$996.92;" that they incurred other damages "by reason of defendants' failure to carry out said contract of purchase;" that they paid out \$381.34 for general taxes, \$112.90 for a special assessment, and \$217.15 for "renewal of said first mortgage which had been assumed by defendants;" and that the total damages suffered by plaintiffs are \$1708.31.

In defendants' affidavit of merits they alleged as a defense that the contract of December 14, 1929, "was forfeited by plaintiffs, and that by its terms the payments made on it by defendants were, as a result of said forfeiture, accepted by plaintiffs in satisfaction and liquidation of all damages, if any, sustained by them." And defendants denied that the market value of the premises in January, 1932, was, as alleged, \$7,290, and stated that at that time the market value was in excess of said sum. And defendants further denied that plaintiffs suffered damages in the sum of \$1708.31, or in any sum.

On the trial plaintiffs introduced in evidence the contract, and called as witnesses Milo G. Reichard, one of the defendants, (under section 33 of the municipal court act), and Lealie E. McCuan, an agent of plaintiffs. It is provided in the contract (which is on a printed form, in use by Albert F. Keeney as a "Realtor," and filled in with typewriting) that if defendants (designated as purchasers) shall first make the payments and perform their agreements thereafter mentioned, plaintiffs (designated as vendors) "will convey and assure to the purchasers, in fee simple, clear of all encumbrances except as hereinafter stated, by a good and sufficient warranty deed," the premises in question, subject,

1932, 1933, 1934, 1935, 1936, 1937, 1938, 1939, 1940, 1941, 1942, 1943, 1944, 1945, 1946, 1947, 1948, 1949, 1950, 1951, 1952, 1953, 1954, 1955, 1956, 1957, 1958, 1959, 1960, 1961, 1962, 1963, 1964, 1965, 1966, 1967, 1968, 1969, 1970, 1971, 1972, 1973, 1974, 1975, 1976, 1977, 1978, 1979, 1980, 1981, 1982, 1983, 1984, 1985, 1986, 1987, 1988, 1989, 1990, 1991, 1992, 1993, 1994, 1995, 1996, 1997, 1998, 1999, 2000, 2001, 2002, 2003, 2004, 2005, 2006, 2007, 2008, 2009, 2010, 2011, 2012, 2013, 2014, 2015, 2016, 2017, 2018, 2019, 2020, 2021, 2022, 2023, 2024, 2025, 2026, 2027, 2028, 2029, 2030, 2031, 2032, 2033, 2034, 2035, 2036, 2037, 2038, 2039, 2040, 2041, 2042, 2043, 2044, 2045, 2046, 2047, 2048, 2049, 2050, 2051, 2052, 2053, 2054, 2055, 2056, 2057, 2058, 2059, 2060, 2061, 2062, 2063, 2064, 2065, 2066, 2067, 2068, 2069, 2070, 2071, 2072, 2073, 2074, 2075, 2076, 2077, 2078, 2079, 2080, 2081, 2082, 2083, 2084, 2085, 2086, 2087, 2088, 2089, 2090, 2091, 2092, 2093, 2094, 2095, 2096, 2097, 2098, 2099, 2100, 2101, 2102, 2103, 2104, 2105, 2106, 2107, 2108, 2109, 2110, 2111, 2112, 2113, 2114, 2115, 2116, 2117, 2118, 2119, 2120, 2121, 2122, 2123, 2124, 2125, 2126, 2127, 2128, 2129, 2130, 2131, 2132, 2133, 2134, 2135, 2136, 2137, 2138, 2139, 2140, 2141, 2142, 2143, 2144, 2145, 2146, 2147, 2148, 2149, 2150, 2151, 2152, 2153, 2154, 2155, 2156, 2157, 2158, 2159, 2160, 2161, 2162, 2163, 2164, 2165, 2166, 2167, 2168, 2169, 2170, 2171, 2172, 2173, 2174, 2175, 2176, 2177, 2178, 2179, 2180, 2181, 2182, 2183, 2184, 2185, 2186, 2187, 2188, 2189, 2190, 2191, 2192, 2193, 2194, 2195, 2196, 2197, 2198, 2199, 2200, 2201, 2202, 2203, 2204, 2205, 2206, 2207, 2208, 2209, 2210, 2211, 2212, 2213, 2214, 2215, 2216, 2217, 2218, 2219, 2220, 2221, 2222, 2223, 2224, 2225, 2226, 2227, 2228, 2229, 2230, 2231, 2232, 2233, 2234, 2235, 2236, 2237, 2238, 2239, 2240, 2241, 2242, 2243, 2244, 2245, 2246, 2247, 2248, 2249, 2250, 2251, 2252, 2253, 2254, 2255, 2256, 2257, 2258, 2259, 2260, 2261, 2262, 2263, 2264, 2265, 2266, 2267, 2268, 2269, 2270, 2271, 2272, 2273, 2274, 2275, 2276, 2277, 2278, 2279, 2280, 2281, 2282, 2283, 2284, 2285, 2286, 2287, 2288, 2289, 2290, 2291, 2292, 2293, 2294, 2295, 2296, 2297, 2298, 2299, 2300, 2301, 2302, 2303, 2304, 2305, 2306, 2307, 2308, 2309, 2310, 2311, 2312, 2313, 2314, 2315, 2316, 2317, 2318, 2319, 2320, 2321, 2322, 2323, 2324, 2325, 2326, 2327, 2328, 2329, 2330, 2331, 2332, 2333, 2334, 2335, 2336, 2337, 2338, 2339, 2340, 2341, 2342, 2343, 2344, 2345, 2346, 2347, 2348, 2349, 2350, 2351, 2352, 2353, 2354, 2355, 2356, 2357, 2358, 2359, 2360, 2361, 2362, 2363, 2364, 2365, 2366, 2367, 2368, 2369, 2370, 2371, 2372, 2373, 2374, 2375, 2376, 2377, 2378, 2379, 2380, 2381, 2382, 2383, 2384, 2385, 2386, 2387, 2388, 2389, 2390, 2391, 2392, 2393, 2394, 2395, 2396, 2397, 2398, 2399, 2400, 2401, 2402, 2403, 2404, 2405, 2406, 2407, 2408, 2409, 2410, 2411, 2412, 2413, 2414, 2415, 2416, 2417, 2418, 2419, 2420, 2421, 2422, 2423, 2424, 2425, 2426, 2427, 2428, 2429, 2430, 2431, 2432, 2433, 2434, 2435, 2436, 2437, 2438, 2439, 2440, 2441, 2442, 2443, 2444, 2445, 2446, 2447, 2448, 2449, 2450, 2451, 2452, 2453, 2454, 2455, 2456, 2457, 2458, 2459, 2460, 2461, 2462, 2463, 2464, 2465, 2466, 2467, 2468, 2469, 2470, 2471, 2472, 2473, 2474, 2475, 2476, 2477, 2478, 2479, 2480, 2481, 2482, 2483, 2484, 2485, 2486, 2487, 2488, 2489, 2490, 2491, 2492, 2493, 2494, 2495, 2496, 2497, 2498, 2499, 2500, 2501, 2502, 2503, 2504, 2505, 2506, 2507, 2508, 2509, 2510, 2511, 2512, 2513, 2514, 2515, 2516, 2517, 2518, 2519, 2520, 2521, 2522, 2523, 2524, 2525, 2526, 2527, 2528, 2529, 2530, 2531, 2532, 2533, 2534, 2535, 2536, 2537, 2538, 2539, 2540, 2541, 2542, 2543, 2544, 2545, 2546, 2547, 2548, 2549, 2550, 2551, 2552, 2553, 2554, 2555, 2556, 2557, 2558, 2559, 2560, 2561, 2562, 2563, 2564, 2565, 2566, 2567, 2568, 2569, 2570, 2571, 2572, 2573, 2574, 2575, 2576, 2577, 2578, 2579, 2580, 2581, 2582, 2583, 2584, 2585, 2586, 2587, 2588, 2589, 2590, 2591, 2592, 2593, 2594, 2595, 2596, 2597, 2598, 2599, 2600, 2601, 2602, 2603, 2604, 2605, 2606, 2607, 2608, 2609, 2610, 2611, 2612, 2613, 26

in defendant's affidavit of notice they alleged as a
fact that the contract of January 24, 1934, was made by
defendant, and that by its terms the payments made on it by defendant
were, as a result of said contract, accepted by plaintiff in
entire satisfaction and liquidation of all charges, if any, sustained by
them. And defendant denied that the market value of the premises
on January 1934 was as alleged, \$7,500, and stated that at that
time the market value was in excess of said sum. And defendant
further denied that plaintiff's alleged charges in the sum of \$

[illegible]

inter alia, to "all taxes and special assessments, assumed by the purchasers" and a "trust deed, recorded as document No. 9,534,463, to secure an indebtedness of \$4,500, due on or about Jan. 15, 1932, with interest at 6 per cent." And the purchasers (defendants) agreed to pay to the vendors (plaintiffs), at the Chicago office of Albert F. Keeney, "as the purchase price of said real estate, the sum of \$9,000 in the manner following: \$4800, by assuming and agreeing to pay the encumbrance now on said real estate, with interest thereon as in said mortgage provided, and the sum of \$4500 in the manner following: \$70 on the execution of this contract, receipt of which is hereby acknowledged, and the remainder as follows: \$70, or more, monthly, commencing January 15, 1930, and continuing thereafter on the 15th day of each and every month succeeding until the entire balance remaining on the principal sum has been paid in full," etc. And the purchasers further agreed to pay all taxes payable in 1928 and subsequent years and all special assessments levied or to be levied. A material paragraph of the agreement is as follows:

"It is expressly agreed that time shall be of the essence of this contract and all the conditions thereof; and that in case of the failure of said purchasers (defendants) to make any of said payments, or perform any of the agreements on their part in this contract made and entered into, this contract shall, at the option of said vendors (plaintiffs), be forfeited and terminated, and such payments shall be retained by said vendors in satisfaction and liquidation of the damages by them sustained, and said vendors shall have the right to re-enter and take possession of all the premises aforesaid."

On the back of the contract are indorsements showing that about the middle of each month, for two years from January 16, 1930, and until December 16, 1931, inclusive, defendants regularly made the stipulated monthly payment of \$70; that a part of each payment was credited to interest account and the balance to principal account; that the payments on account of principal, including the original payment of \$70 when the contract was executed, aggregated about \$720; and that the total of all pay-

first time, to "all terms and conditions" contained in the
 "contract" and a "trust deed" executed on January 12, 1932, and
 to secure an indebtedness of \$2,500, due on or about Jan. 12, 1932,
 with interest at 6 per cent. and the purchase (debt) was
 to pay to the vendors (plaintiffs) at the Chicago Office of Albert
 J. Kennedy, "on the purchase price of said real estate, the sum of
 \$2,500 in the manner following: \$1,000, by financing and agreeing to
 pay the encumbrance now on said real estate, with interest thereon
 as in said mortgage provided, and the sum of \$1,500 in the manner
 following: \$50 on the execution of this contract, receipt of which
 is hereby acknowledged, and the remainder as follows: \$50, or more,
 monthly, commencing January 12, 1932, and continuing thereafter on
 the 12th day of each and every month succeeding until the entire
 balance remaining on the principal sum has been paid in full," etc.
 and the purchase contract agreed to pay all taxes payable in 1932
 and subsequent years and all special assessments levied or to be
 levied. A material paragraph of the agreement is as follows:

"It is expressly agreed that this shall be of the
 essence of this contract and all the conditions, covenants and terms
 in and to the terms of said purchase (debt) be made
 any of said payments, or payment any of the payments on said
 debt in this contract made and notes (and, that contract shall,
 at the option of said vendor (plaintiff), be retained and not
 released, and such payment shall be retained by said vendor in
 satisfaction and fulfillment of the payment of the debt and
 and said vendor shall have the right to receive and the
 possession of all the proceeds thereof."

On the back of the contract are endorsements showing
 that about the middle of each month, for two years from January
 12, 1932, and until December 12, 1933, inclusive, defendants
 regularly made the stipulated monthly payment of \$50; that a part
 of each payment was credited to interest account and the balance
 to principal account; that the payments on account of principal,
 including the original payment of \$50 were the subject of all pay-
 ments, aggregated about \$750; and that the total of all pay-

ments made to plaintiffs was over \$1700.

It appears from the testimony of plaintiffs' witnesses that defendants moved out of the premises early in January, 1932; that up to that time they had made all required monthly payments to plaintiffs, but had not paid some of the accrued taxes and one special assessment of \$25; that they did not pay any part of said first mortgage of \$4500, which matured on January 15, 1932; that shortly after defendants moved out plaintiffs took possession and arranged for the extension of the mortgage; that prior to February 1, 1932, plaintiffs commenced a suit against defendants to collect the installment of \$70, which matured on January 15, 1932; that thereafter they paid the accrued taxes on the premises, re-decorated the building completely, made repairs, and negotiated for the sale of the premises to a third party; that about the middle of March, 1932, they sold the premises to the third party for \$7,290; and that thereafter the suit for \$70 against defendants was dismissed upon plaintiffs' motion and the present action instituted on April 15, 1932.

After reviewing the pleadings and evidence we are of the opinion that the finding and judgment of the trial court are fully warranted. When defendants moved out of the premises in January, 1932, and thereafter failed to pay the \$70 installment due on January 15, 1932, and certain accrued taxes, plaintiffs, under the provisions of the particular paragraph of the contract above quoted, had the option or election of declaring the contract forfeited and terminated. By their acts done thereafter (viz., taking possession of the premises, making repairs, re-decorating the building, negotiating for the sale of the premises and finally in March, 1932, selling the same to a third party), we think it should be held that they elected to declare the contract with defendants forfeited and terminated, and that the same was for-

It appears from the testimony of Plaintiff's witnesses that Defendant moved out of the premises early in January, 1938, and that up to that time they had made all payments monthly pursuant to the terms of the contract. Plaintiff has not paid some of the agreed taxes and insurance premiums of \$225; that they did not pay any part of said taxes mortgage of \$1000, which matured on January 15, 1938; that Plaintiff after Defendant moved out Plaintiff took possession and arranged for the redemption of the mortgage; that prior to January 15, 1938, Plaintiff commenced a suit against Defendant to collect the installment of \$75, which matured on January 15, 1938; that thereafter they paid the agreed taxes on the premises, re-estimated the building completely, made repairs, and negotiated for the sale of the premises to a third party; that about the middle of March, 1938, they sold the premises to the third party for \$7,500; and that thereafter the suit for \$75 against Defendant was dismissed upon Plaintiff's motion and the present action instituted on April 16, 1938.

After reviewing the pleadings and evidence as set out in the opinion and judgment of the trial court the Court concluded that the facts were as follows:

In January, 1937, the Defendant failed to pay the \$75 installment due on January 15, 1938, and certain accrued taxes, Plaintiff under the provisions of the particular paragraph of the contract above quoted, had the option or election of declaring the contract forfeited and terminated. My client asks some questions (Vla.)

Latter possession of the premises, making repairs, re-estimated the building, negotiating for the sale of the premises and finally in March, 1938, selling the same to a third party. We think it should be held that they elected to declare the contract void.

feited and terminated. And it also appearing that plaintiffs have retained all of defendants' prior payments (aggregating over \$1700), we think that the further provision in said paragraph (above quoted) of the contract is applicable, and that it should be held that such retention by plaintiffs is "in satisfaction and liquidation of the damages" sustained by them, and that in the present action they cannot recover any further sums as damages.

The judgment of the municipal court, appealed from, is affirmed.

AFFIRMED.

Scanlan, P. J., and Sullivan, J., concur.

Twice and sometimes, and it also appears that plaintiffs
have retained all of the above, with possible exceptions
over 1970, and that the further provision is made paragraph
(above quoted) of the contract in application, and that it should
be held that such retention by plaintiffs is "in satisfaction and
liquidation of the damages" retained by them, and that in the
present action they cannot recover any further sums as damages.
The judgment of the majority seems, against them.

is affirmed.

ATTORNEYS.

Testimony of P. L. and William, Jr. common.

36288

LAURENCE M. FINE, for use of
SECURITY BANK OF CHICAGO,
a corporation,
Plaintiff and Appellant,

v.

THOMAS J. GRADY and THOMAS
MALONEY,
Garnishees.

MICHAEL FERRITER, ROBERT D.
MELICK and M. D. DOLAN,
Intervening petitioners and
Appellees.

APPEAL FROM

MUNICIPAL COURT
OF CHICAGO.

270 I.A. 628²

MR. JUSTICE GRIMLEY DELIVERED THE OPINION OF THE COURT.

On May 13, 1932, after a trial without a jury in a garnishment proceeding, the court of its own motion struck from the files the intervening petition of Morris Summers, and, on plaintiff's motion, ordered that one of the garnishees, Thomas Maloney, be discharged as such; and the court, as to the issues existing between plaintiff and the three remaining intervening petitioners, found these issues in favor of Michael Ferriter, Robert D. Melick and M. D. Dolan, intervening petitioners, and entered judgment on the finding against Thomas J. Grady, garnishee, in the sum of \$1190.15, "to be paid as follows: \$333.12 for use of Michael Ferriter, \$18.70 for use of Robert D. Melick, and \$838.33 for use of M. D. Dolan." Plaintiff has appealed from the judgment.

On April 6, 1929, the Security Bank of Chicago caused a judgment by confession for \$15,311.14 to be entered in the municipal court against Laurence M. Fine, on two of his promissory notes, dated August 5, 1926, and payable respectively in six and twelve months to the order of the bank. On May 2, 1929, the execution was returned

38888

LAURENCE E. TAYLOR, for one of
defendants in the
appeal.

17

THOMAS E. TAYLOR and others
appellants.

THOMAS E. TAYLOR, for one of
defendants in the
appeal.

THE COURT WILL REMAND THE CASE TO THE TRIAL.

On May 12, 1932, after a trial without a jury in a

prolonged proceeding, the court of the two judges then
the trial the intervening petition of Maria Hernandez, and, on
plaintiff's motion, entered that one of the defendants, Thomas
Maloney, be discharged as agent and the court, as to the issues
existing between plaintiff and the three remaining intervening
defendants, found those issues in favor of Richard Horvitz,
defendant. Plaintiff and R. E. Taylor, intervening defendant, and

defendant judgment on the trial against Thomas E. Taylor, plaintiff, in
the sum of \$118.75, to be paid as follows: \$118.75 for use of R. E.
Taylor, \$118.75 for use of Richard E. Malick, and \$118.75 for use
of Horvitz. Plaintiff has appealed from the judgment.

On April 24, 1932, the Circuit Court of Chicago issued a
judgment by confession for \$118.75 to be entered in the municipal
court against Laurence E. Taylor and one of his attorneys named, dated
March 2, 1932, and payable respectively in six and twelve months to
the sum of the bank. On May 2, 1932, the execution was returned

270 I.A. 628

UNITED STATES

OF DISTRICT

by the bailiff "no part satisfied." On December 28, 1931, the present garnishment proceeding was commenced against Thomas J. Grady and Thomas Maloney, as garnishees, who thereafter files separate answers.

In the answer of Thomas J. Grady, filed January 13, 1932, he stated in substance that on or about October 14, 1930, in the municipal court, case No. 1413531, a judgment for \$1190.15 was entered against him and in favor of Thomas Maloney; that on appeal to the appellate court the judgment was affirmed, and it is unpaid and in full force and effect; that on October 14, 1930, (about the day of the entry of the judgment) Maloney, by written assignment duly acknowledged, assigned the judgment to Laurence E. Fine; that on November 3, 1930, the assignment was filed in the municipal court and duly noted on the half-sheet of cause No. 1413531; that thereby Fine became the owner of said judgment; and that by reason of the foregoing this garnishee (Grady) is indebted to Fine, as assignee of the judgment, in the sum of \$1190.15, together with accrued interest at 5 per cent per annum.

In the answer of Thomas Maloney, the other garnishee, filed January 22, 1932, he stated in substance that neither at the time of the service of the garnishment writ upon him nor at any time thereafter was he indebted to Fine, nor is he now indebted to him, in any sum. And he further stated that about the time he obtained his judgment against Grady for \$1190.15, he duly assigned it to Fine by written assignment, duly acknowledged, and the assignment was filed in cause No. 1413531; that the assignment was made to Fine "in trust as security, and for the purpose of the distribution of the proceeds of said judgment," as per a written agreement (copy attached), dated October 29, 1930, between him (Maloney) and Fine; that on said day there was due from him (Maloney) to Fine a balance of \$100 for attorneys' fees, but that thereafter the balance was paid to Fine, etc.

By the exhibit "no good collected". In November 22, 1931, the
 present government proceeding was commenced against Thomas J. Brady
 and Thomas Maloney, as defendants, and the present filed separate

In the answer of Thomas J. Brady, filed January 12, 1932,
 he stated in substance that on or about October 14, 1930, in the
 municipal court, case No. 121501, a judgment was entered
 against him and in favor of Thomas Maloney that on appeal to the
 appellate court the judgment was affirmed, and it is urged and in
 full (renewed effect) that on October 14, 1930, (about the day
 of the entry of the judgment) Maloney by written assignment duly
 acknowledged, assigned the judgment to Lawrence E. Fine; that on
 November 2, 1930, the assignment was filed in the municipal court
 and duly noted on the roll-book of case No. 121501, that Brady
 Fine became the owner of said judgment; and that by reason of the
 foregoing this complaint (Brady) is subject to Fine, as assignee
 of the judgment, in the sum of \$1110.12, together with interest
 thereon at 4 per cent per annum.

In the answer of Thomas Maloney, filed January 12, 1932,
 filed January 12, 1932, he stated in substance that with a view
 to the purpose of the government with whom he was at the
 time the judgment was entered to that, now he is not indebted to
 him in any sum. He further stated that about the time he
 assigned his judgment against Brady to Fine, he only assigned
 it to Fine by written assignment, duly acknowledged, and the assign-
 ment was filed in case No. 121501; that the assignment was made in
 fine "in fine" as security, and for the purpose of the disposition
 of the proceeds of said judgment, "as per a written agreement" (copy
 attached), dated October 22, 1930, between him (Maloney) and Fine;
 that on said day Fine was the owner of the judgment, in the sum of
 \$1110.12, and that the judgment was then assigned to Fine.

It appears from the copy of the written agreement that it is dated October 29, 1930, and purports to be signed and sealed by Maloney and Fine; that it is therein recited in substance that in the municipal court cause, No. 1413551, Maloney recovered a judgment against Grady for "approximately \$1200," that the case has been appealed to the appellate court and it is necessary to expend further moneys for services, printing, costs and other expenses, that Fine has rendered attorney's services in that cause and is to receive \$300 for the services, that one M. D. Dolan has also rendered services therein and is entitled to a fee therefor, that one Morris Sommers has made certain advances to Fine for Maloney's benefit, and that Maloney is indebted to one Michael Ferriter for cash advanced from time to time in the sum of \$400, who is continuing to advance further sums. It is then agreed between Maloney and Fine as follows:

That Maloney shall execute and deliver to Fine an assignment of said judgment "with the understanding that Fine shall, upon the ultimate recovery and collection of said judgment and interest thereon, apply and distribute the proceeds as follows:"

1. That Fine shall pay to himself any unpaid balance due him for his services as aforesaid, and also reimburse himself for any expenses by way of costs, printing or otherwise in connection with the aforesaid suit.

2. To repay to said Morris Sommers such amounts advanced by him for and on behalf of Maloney, to the extent that the work, labor and material furnished by Sommers shall have fallen short of the advances by Sommers to Fine.

3. \$100 to be paid to M. D. Dolan as and for his fee for services rendered in said cause.

4. \$50 to be paid to Robert D. Melick, attorney, for assistance rendered and to be rendered in the preparation of the brief and otherwise in said cause.

5. All of the balance of said judgment to be paid to Michael Ferriter to apply on indebtedness which has accrued and is to accrue for numerous advances by Ferriter to Maloney.

About the same time (January, 1932) that Maloney's answer (as garnishee) was filed, M. D. Dolan, by leave of court, filed an intervening petition in which he alleged that on December 31, 1930, he recovered a judgment in the municipal court against Maloney in the sum of \$2265.05, which judgment is still in full force and effect. After setting forth the facts (as stated in Maloney's said answer) of Maloney's recovery of said judgment against Grady of \$1190.15, on

October 14, 1930, of Maloney's assignment of that judgment to Fine, and of the agreement between Maloney and Fine of October 29, 1930, Dolan further alleged that the assignment of said judgment to Fine "was not made for the purpose of transferring the same to Fine, individually, but to Fine in trust to pay specified parts thereof to M. D. Dolan and other creditors of Maloney, in pursuance of a certain agreement in writing, executed by Maloney and Fine at the time of said assignment, which said writing is now in the possession of Fine;" and that said judgment "does not belong to and is not the property of Fine, but that he holds the same as trustee for your petitioner (Dolan) and other creditors of Maloney."

To Dolan's intervening petition Fine (the nominal plaintiff), on January 23, 1932, filed an answer in which he admitted the recovery by Maloney of said judgment of \$1190.15; admitted the assignment of said judgment by Maloney to Fine, under an agreement in writing (copy attached), dated October 29, 1930, and entered into by and between Maloney and Fine, "designating the persons therein named as distributees of the funds recovered from said judgment, subject to the conditions and limitations in said agreement;" and alleged that "there is nothing due from Maloney to respondent (Fine) and that he now has no financial interest in said assignment."

During March, 1932, by leave of court, Michael Ferriter, Robert Melick and Morris Sommers, each filed separate intervening petitions. As Sommers did not appear at the subsequent hearing and did not cause any testimony to be introduced to sustain his petition, and as the court made no finding concerning him, the allegations of his petition need not be mentioned. In Melick's petition, after referring to the judgment obtained by Maloney against Grady, the assignment thereof by Maloney to Fine, and the written agreement between Maloney and Fine of October 29, 1930, he alleged that

October 14, 1930, at Melnik's assignment of said judgment to him, and at the agreement between Melnik and him of October 20, 1930, after having alleged that the assignment of said judgment to him was not made for the purpose of transferring the same to him, respectively, but is void as to the purpose of transferring the same to him, in a. b. Melnik and other associates of Melnik, in accordance with certain agreement in writing, executed by Melnik and him on the day of said assignment, which said writing is now in the possession of him; and that said judgment "does not belong to him and he has the property of him, but that he holds the same as trustee for your petition (Melnik) and other co-defendants of Melnik."

In Melnik's intervening petition (the nominal plaintiff) on January 22, 1932, filed an answer in which he admitted the recovery by Melnik of said judgment of \$1500.00 and admitted the assignment of said judgment by Melnik to him, under an agreement in writing (copy attached), dated October 20, 1930, and entered into by and between Melnik and him, "determining the parties therein as co-defendants of the funds recovered from said judgment, subject to the conditions and limitations in said agreement," and alleged that "there is nothing due from Melnik to respondent (him) and that he now has no financial interest in said assignment."

During March, 1932, by leave of court, Michael Tarkenton, Trustee of the said funds, was filed against Melnik's intervening petition. On November 21st and again at the subsequent hearing and did not come and testimony as to the interest in Melnik's petition and at the court made no finding concerning him, the allegations of his petition need not be mentioned. In Melnik's petition, after referring to the judgment obtained by Melnik against Melnik, the respondents (Melnik and him) and the written agreement between Melnik and him of October 20, 1930, he alleged that

"said judgment was assigned to Fine, not individually, but as trustee to collect and pay the proceeds to petitioner and certain other creditors of Maloney, in accordance with the provisions of said written agreement;" that "on October 14, 1930, and for a long time prior thereto, Maloney was indebted to petitioner in the sum of \$50," and that by the assignment of said judgment "the beneficial interest thereof was not transferred to Fine, but that he held the same for the benefit of Maloney's creditors, including petitioner." In Ferriter's petition he alleged (1) that on October 29, 1930, Maloney was indebted to him in the sum of \$900 for money loaned from time to time; (2) that Maloney obtained a judgment against Grady for \$1190.15, and assigned the same to Fine "in trust for collection and payment to the following creditors of Maloney in these amounts; Sommers \$200, Bolan \$150, Melick \$50, and the balance to your petitioner to apply on said indebtedness;" and (3) that said judgment "is not the property of Fine, but that he holds the same as trustee on the trusts above set forth."

On the trial the three intervening petitioners, Ferriter, Melick and Bolan, to sustain the allegations of their respective petitions, introduced considerable documentary evidence, including the assignment to Fine of the judgment for \$1190.15, and the written agreement between Maloney and Fine of October 29, 1930, and they called as their principal witness Laurence M. Fine, who gave testimony, and was cross-examined at great length by the attorney for the beneficial plaintiff. Each of the three intervening petitioners testified in his own behalf and each was cross-examined. And Thomas Maloney, called by the petitioners, gave considerable testimony on direct and cross-examination and on examination by the court. No evidence whatever was offered by the beneficial plaintiff to contradict that introduced by the intervening petitioners, which disclosed that Fine, in taking the assignment from Maloney of his

"said judgment was assigned to him, not individually, but as
member of the court and by the proceeds of position and certain
other evidence of his own, in accordance with the provisions of
the said judgment." That "on October 14, 1933, and for a long
time before that, Kelley was indebted to petitioner in the sum
of \$100," and that by the assignment of said judgment "the beneficial
interest therein was not transferred to him, but that he held the
same for the benefit of Kelley's estate, including petitioner."
In petitioner's petition he alleged (1) that on October 14, 1933,
Kelley was indebted to him in the sum of \$100 for money loaned
from him to him; (2) that Kelley obtained a judgment against
him for \$1130.18, and assigned the same to him "in trust for
petitioner and payment to the following creditors of Kelley in
those amounts: Thomas \$300, John \$100, Kelley \$200, and the balance
to him petitioner to apply on said indebtedness;" and (3) that
said judgment "is not the property of him, but that he holds the
same as trustee on the trusts above set forth."

On the trial the facts concerning petitioner's testimony,
Kelley and Kelley, to maintain the allegations of their respective
petitioners, introduced considerable documentary evidence, including
the assignment to him of the judgment for \$1130.18, and the written
agreement between Kelley and him on October 14, 1933, and they
called as their principal witness Thomas E. Kelley, who was exam-
ined and was cross-examined as to the facts by the attorney for the
beneficial plaintiff. Each of the three intervening petitioners
testified in his own behalf and each was cross-examined. In
Thomas Kelley's testimony by the petitioner, some considerable testi-
mony on direct and cross-examination was introduced by the court.
In various places the court was aided by the beneficial plaintiff in
concluding that introduced by the intervening petitioners, which
disclosed that him, in making the assignment from Kelley to his

judgment against Grady, received it not individually for his own benefit (except as security for a small indebtedness which Maloney then owed to him and which afterwards was paid in full) but as trustee, in trust for the use and benefit of the four intervening petitioners, including Commers (who failed to appear on the trial and prove his claim.)

The main contention of counsel for the beneficial plaintiff is that the findings and judgment of the court are against the manifest weight of the evidence. We cannot agree with the contention. We think it clearly appears that Fine, as assignee of the judgment for \$1190.15, held such assignment not for his own benefit but as a trustee for the use and benefit of the intervening petitioners. It is well settled on principles of equity that property held by an execution debtor in trust for others, and not for himself individually, is not subject to garnishment by the execution creditor. (28 Corpus Juris, p. 119, sec. 163; Hodson v. McConnell, 12 Ill. 170, 172; Carr v. Faugh, 28 Ill. 418, 423; Newman v. Commercial Nat. Bank, 156 Ill. 530, 539; Hair v. Northwestern Nat. Bank, 50 Ill. App. 211, 215; Dandridge v. Northern Trust Co., 218 Ill. App. 138, 141.) Counsel for the beneficial plaintiff argue in their brief in substance that the written agreement of October 29, 1930, between Maloney and Fine, as to distribution of the proceeds of said judgment, was a mere "subterfuge" and fraudulent as to the rights of their client. But they did not introduce any evidence tending to prove any such fraud, and fraud is never presumed and the burden of proving the invalidity of such instrument on the ground of fraud was upon the beneficial plaintiff. (See Sheldon v. Hinton, 6 Ill. App. 216, 224.)

And counsel, further contending that the written agreement of October 29, 1930, does not properly constitute an equitable assignment, in favor of the intervening petitioners, of the proceeds of said

judgments against Grady, received it not individually for his own benefit (except as security for a small indebtedness which Grady owed to him and which afterwards was paid in full) but as trustee, in trust for the use and benefit of the two intervening petitioners, including Grady (who failed to appear on the trial and prove his claim).

The main contention of counsel for the beneficial plaintiffs is that the findings and judgment of the court are against the main fact weight of the evidence. We cannot agree with the contention. We think it clearly appears that Wiles, as assignee of the judgment for \$210.00, held such assignment not for his own benefit but as a trustee for the use and benefit of the intervening petitioners. It is well settled on principles of equity that property held by an individual in trust for others, and not for himself individually, is not subject to attachment by the execution creditor. (23 Cal. 2d 111, 112, 113, 114, 115, 116, 117, 118, 119, 120, 121, 122, 123, 124, 125, 126, 127, 128, 129, 130, 131, 132, 133, 134, 135, 136, 137, 138, 139, 140, 141, 142, 143, 144, 145, 146, 147, 148, 149, 150, 151, 152, 153, 154, 155, 156, 157, 158, 159, 160, 161, 162, 163, 164, 165, 166, 167, 168, 169, 170, 171, 172, 173, 174, 175, 176, 177, 178, 179, 180, 181, 182, 183, 184, 185, 186, 187, 188, 189, 190, 191, 192, 193, 194, 195, 196, 197, 198, 199, 200, 201, 202, 203, 204, 205, 206, 207, 208, 209, 210, 211, 212, 213, 214, 215, 216, 217, 218, 219, 220, 221, 222, 223, 224, 225, 226, 227, 228, 229, 230, 231, 232, 233, 234, 235, 236, 237, 238, 239, 240, 241, 242, 243, 244, 245, 246, 247, 248, 249, 250, 251, 252, 253, 254, 255, 256, 257, 258, 259, 260, 261, 262, 263, 264, 265, 266, 267, 268, 269, 270, 271, 272, 273, 274, 275, 276, 277, 278, 279, 280, 281, 282, 283, 284, 285, 286, 287, 288, 289, 290, 291, 292, 293, 294, 295, 296, 297, 298, 299, 300, 301, 302, 303, 304, 305, 306, 307, 308, 309, 310, 311, 312, 313, 314, 315, 316, 317, 318, 319, 320, 321, 322, 323, 324, 325, 326, 327, 328, 329, 330, 331, 332, 333, 334, 335, 336, 337, 338, 339, 340, 341, 342, 343, 344, 345, 346, 347, 348, 349, 350, 351, 352, 353, 354, 355, 356, 357, 358, 359, 360, 361, 362, 363, 364, 365, 366, 367, 368, 369, 370, 371, 372, 373, 374, 375, 376, 377, 378, 379, 380, 381, 382, 383, 384, 385, 386, 387, 388, 389, 390, 391, 392, 393, 394, 395, 396, 397, 398, 399, 400, 401, 402, 403, 404, 405, 406, 407, 408, 409, 410, 411, 412, 413, 414, 415, 416, 417, 418, 419, 420, 421, 422, 423, 424, 425, 426, 427, 428, 429, 430, 431, 432, 433, 434, 435, 436, 437, 438, 439, 440, 441, 442, 443, 444, 445, 446, 447, 448, 449, 450, 451, 452, 453, 454, 455, 456, 457, 458, 459, 460, 461, 462, 463, 464, 465, 466, 467, 468, 469, 470, 471, 472, 473, 474, 475, 476, 477, 478, 479, 480, 481, 482, 483, 484, 485, 486, 487, 488, 489, 490, 491, 492, 493, 494, 495, 496, 497, 498, 499, 500, 501, 502, 503, 504, 505, 506, 507, 508, 509, 510, 511, 512, 513, 514, 515, 516, 517, 518, 519, 520, 521, 522, 523, 524, 525, 526, 527, 528, 529, 530, 531, 532, 533, 534, 535, 536, 537, 538, 539, 540, 541, 542, 543, 544, 545, 546, 547, 548, 549, 550, 551, 552, 553, 554, 555, 556, 557, 558, 559, 560, 561, 562, 563, 564, 565, 566, 567, 568, 569, 570, 571, 572, 573, 574, 575, 576, 577, 578, 579, 580, 581, 582, 583, 584, 585, 586, 587, 588, 589, 590, 591, 592, 593, 594, 595, 596, 597, 598, 599, 600, 601, 602, 603, 604, 605, 606, 607, 608, 609, 610, 611, 612, 613, 614, 615, 616, 617, 618, 619, 620, 621, 622, 623, 624, 625, 626, 627, 628, 629, 630, 631, 632, 633, 634, 635, 636, 637, 638, 639, 640, 641, 642, 643, 644, 645, 646, 647, 648, 649, 650, 651, 652, 653, 654, 655, 656, 657, 658, 659, 660, 661, 662, 663, 664, 665, 666, 667, 668, 669, 670, 671, 672, 673, 674, 675, 676, 677, 678, 679, 680, 681, 682, 683, 684, 685, 686, 687, 688, 689, 690, 691, 692, 693, 694, 695, 696, 697, 698, 699, 700, 701, 702, 703, 704, 705, 706, 707, 708, 709, 710, 711, 712, 713, 714, 715, 716, 717, 718, 719, 720, 721, 722, 723, 724, 725, 726, 727, 728, 729, 730, 731, 732, 733, 734, 735, 736, 737, 738, 739, 740, 741, 742, 743, 744, 745, 746, 747, 748, 749, 750, 751, 752, 753, 754, 755, 756, 757, 758, 759, 760, 761, 762, 763, 764, 765, 766, 767, 768, 769, 770, 771, 772, 773, 774, 775, 776, 777, 778, 779, 780, 781, 782, 783, 784, 785, 786, 787, 788, 789, 790, 791, 792, 793, 794, 795, 796, 797, 798, 799, 800, 801, 802, 803, 804, 805, 806, 807, 808, 809, 810, 811, 812, 813, 814, 815, 816, 817, 818, 819, 820, 821, 822, 823, 824, 825, 826, 827, 828, 829, 830, 831, 832, 833, 834, 835, 836, 837, 838, 839, 840, 841, 842, 843, 844, 845, 846, 847, 848, 849, 850, 851, 852, 853, 854, 855, 856, 857, 858, 859, 860, 861, 862, 863, 864, 865, 866, 867, 868, 869, 870, 871, 872, 873, 874, 875, 876, 877, 878, 879, 880, 881, 882, 883, 884, 885, 886, 887, 888, 889, 890, 891, 892, 893, 894, 895, 896, 897, 898, 899, 900, 901, 902, 903, 904, 905, 906, 907, 908, 909, 910, 911, 912, 913, 914, 915, 916, 917, 918, 919, 920, 921, 922, 923, 924, 925, 926, 927, 928, 929, 930, 931, 932, 933, 934, 935, 936, 937, 938, 939, 940, 941, 942, 943, 944, 945, 946, 947, 948, 949, 950, 951, 952, 953, 954, 955, 956, 957, 958, 959, 960, 961, 962, 963, 964, 965, 966, 967, 968, 969, 970, 971, 972, 973, 974, 975, 976, 977, 978, 979, 980, 981, 982, 983, 984, 985, 986, 987, 988, 989, 990, 991, 992, 993, 994, 995, 996, 997, 998, 999, 1000)

judgment, cite the case of Commercial National Bank v. Kirkwood, 172 Ill. 563, in support of their contention. We cannot see that the holdings in that case, under its particular facts, should so be applied to the facts in the present case as to require a reversal of the judgment.

Our conclusion is the trial court did not err in entering the judgment appealed from, and accordingly it will be affirmed.

AFFIRMED.

Scanlan, P. J., and Sullivan, J., concur.

...the case of Commercial Union Assurance Co. v. ...

...in respect of their constitution. The court has

...that the holding in that case, under the particular facts, should

...be applied to the facts in the present case as to require a

reversal of the judgment.

Our conclusion is the trial court did not err in order-

ing the judgment appealed from, and accordingly it will be affirmed.

ATTORNEYS.

Respectfully, J. L. and J. L. ...

36307

86 A

MIDWAY STATE BANK,
a corporation,
Plaintiff and Appellant,

v.

JOHN H. BANTSOLAS and
N. NOMIKOS,
Defendants.

APPEAL FROM
MUNICIPAL COURT
OF CHICAGO.

N. NOMIKOS,
Appellee.

270 I.A. 628³

MR. JUSTICE GRIMLEY DELIVERED THE OPINION OF THE COURT.

On February 9, 1932, plaintiff caused a judgment by confession for \$1163.97, including attorney's fees, to be entered against the defendants upon a judgment note for \$1,000, signed by them, dated June 15, 1931, and payable thirty days after date to plaintiff's order at its banking house in Chicago, with interest at 7 per cent per annum after maturity. On February 19, 1932, the court, on Nomikos' verified petition being filed, ordered that the judgment be opened, that he be given leave to defend, that the judgment stand as security and that his petition stand as an affidavit of merits. On July 21, 1932, there was a trial without a jury, resulting in the court finding the issues against plaintiff as to Nomikos, and adjudging that the judgment as confessed against him be set aside and he recover his costs from plaintiff. The present appeal followed.

In Nomikos' petition or affidavit of merits he made the following allegations in substance:

That about November 15, 1930, at Bantsolas' request, he went to plaintiff bank with Bantsolas and had an interview with plaintiff's cashier, Ray A. Delassus; that Delassus as such

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STATE OF NEW YORK
IN SENATE
JANUARY 10, 1934

1

REPORT OF THE
COMMISSIONER OF THE
LAND OFFICE

ALBANY:

1934

1934

THE LAND OFFICE HAS RECEIVED THE REPORT OF THE COMMISSIONER OF THE LAND OFFICE

On February 1, 1934, Plaintiff caused a judgment by

consent for \$1165.00, including attorney's fees, to be entered
against the defendant upon a judgment note for \$1,000, signed by

them, dated June 12, 1931, and payable thirty days after date to

plaintiff's order at the banking house in Chicago, with interest

at 7 per cent per annum after maturity. On February 17, 1932, the

court, on defendant's verified petition being filed, ordered that the

judgment be signed, and he be given leave to defend, and the judg-

ment stand as security and that his petition stand as an affidavit

of worth. On July 21, 1932, there was a trial without a jury.

Verdict in the court finding the issues against plaintiff as to

liability, and adjourning that the judgment be signed against him

for the costs and he recover his costs from plaintiff. The present

appeal follows.

In defendant's petition on affidavit of worth he made the

following allegations as substantiated:

That about November 22, 1930, at New Orleans, Louisiana,

he went to plaintiff's bank with defendant and had an interview

with plaintiff's cashier, by whom defendant was informed that

270 I.A. 828

cashier told him (Nomikos) that Bantsolas and others had previously signed a note to the bank in the amount of about \$6,000, and that "Bantsolas did not have enough balance in his account to show and satisfy the bank examiner and the directors of the bank that the loan to Bantsolas was justified;" that thereupon both Bantsolas and Delassus requested him (Nomikos) to sign a note to the bank for \$1,000 (which had already been signed by Bantsolas) and that the sum of \$1,000 would be credited to Bantsolas' account with the bank; that upon his refusal to comply with the request Delassus, as cashier, represented to and promised him (Nomikos) that said sum of \$1,000 "would always remain in the bank as a guarantee of the \$1,000 note and that said sum would not under any consideration or condition be withdrawn by said Bantsolas or be applied or used for any other purpose;" that thereupon he (Nomikos), relying upon the representations and guaranty of Delassus as such cashier, executed the \$1,000 note, already signed by Bantsolas, payable to the bank's order, and removed the same from time to time; and that he (Nomikos) "never received any consideration for signing the note," which was signed "only after said representations and agreement of the cashier of the bank had been made."

On the trial Nomikos was a witness in his own behalf and Bantsolas testified for him. Nomikos also called Delassus, the cashier of the bank, as a witness under section 33 of the Municipal Court Act. Delassus gave further testimony when called as plaintiff's witness. Certain writings also were introduced. The evidence disclosed in substance that Bantsolas and other members of a church, on receiving a loan from the bank, had executed a note for \$12,000; that by various payments this indebtedness had been reduced to \$5,800; that on May 7, 1930, Bantsolas and said other members executed and delivered to the bank their judgment note for \$5,800, payable to the order of the bank; that by October, 1930, only two payments on this note had been made, reducing the indebtedness to about \$5500; that the bank, expecting a visit from a bank examiner, desired to have its record show that at least one of the signers of this note carried a deposit in the bank; that it requested Bantsolas to make such a deposit but he either could not or would not do so; that an arrangement was made between Bantsolas and Delassus that if Bantsolas would sign a \$1,000 note payable to the bank and procure the signature of another person on the note, the bank would deposit \$1,000 of its funds to the credit of

Bantasolas in a savings account in the bank in Bantasolas' name; that during October, 1930, on the representations made by Delassus, substantially as above stated in Nomikos' petition, Nomikos signed a \$1,000 note underneath the signature of Bantasolas, payable to the bank, and thereafter signed similar renewal notes including the note sued upon, dated June 15, 1931; that Nomikos never received any consideration for signing any of said notes; that upon the execution of the first \$1,000 note the bank opened a savings account in Bantasolas' name giving him a credit therein of \$1,000; that Bantasolas never received a bank book evidencing said credit to him, and never thereafter made any deposits to or withdrawals from the account or exercised any control over the account or made any demands on the bank for the money; that the savings account remained in the same condition on the bank's books as it was when opened, until February 6, 1932; that in December, 1930, the bank caused a judgment by confession to be entered against Bantasolas and the other signers of the \$5,800 note; that the indebtedness evidenced thereby was thereafter put in a "suspense account;" that on February 6, 1932, Delassus, as cashier, by an entry on the bank's books made a pretended transfer of the \$1,000 (still in said savings account to the credit of Bantasolas) to said "suspense account" and credited the \$1,000 on the old indebtedness of Bantasolas as evidenced by said \$5,800 note; and that, three days afterward, the present judgment by confession was entered as first above mentioned.

After considering all the evidence, we are of the opinion that the court was fully warranted in holding that Nomikos was not liable to the bank on the note sued upon, and in entering the judgment appealed from against the bank in Nomikos' favor. It sufficiently appears that the note sued upon, so far as Nomikos is concerned, has no consideration to support it. In this connection the case of Straus v. Citizens State Bank, 254 Ill. 185 (affirming

164 Ill. App. 420, 431) may be cited, where it is said (p. 137):

"If there was no consideration for the note the bank cannot be a holder in due course for value. There are some propositions that are so well settled and clear that any attempt at argument in support of them is a useless expenditure of time. That a promissory note made and executed without consideration and received by the payee upon an agreement that the maker should never be called upon to pay the same is invalid in the hands of such payee and cannot be enforced against the maker, is a proposition of that character."

The judgment of July 21, 1932, appealed from, should be and is affirmed.

AFFIRMED.

Scanlan, P. J., and Sullivan, J., concur.

36316

ELEANOR GETZENDAUER,
Appellee,

v.

CHICAGO, BURLINGTON &
QUINCY RAILROAD CO.,
a corporation,
Appellant.

87 A
APPEAL FROM CIRCUIT COURT,
COOK COUNTY.

270 I.A. 628⁴

MR. JUSTICE CHILLEY DELIVERED THE OPINION OF THE COURT.

By this appeal defendant seeks to reverse a judgment rendered against it on May 14, 1932, for \$2950, following the verdict of a jury, in an action of trespass on the case for damages, occasioned by the destruction by fire of certain horses, the property of plaintiff, while in defendant's car at Imperial, Nebraska. There have been two trials of the case. The first, in February, 1932, resulted in a verdict against defendant for the same amount, but a new trial was granted.

Plaintiff's declaration as amended consisted of four counts, to each of which defendant pleaded the general issue. In the first count it is averred that on January 7, 1929, defendant possessed and operated a railroad and was a common carrier for hire; that on said day plaintiff at Imperial, Nebraska, caused to be delivered to it, and it received, fourteen horses belonging to plaintiff to be safely carried from Imperial to Riverside, California, and at the last named place to be safely delivered to plaintiff for a reward paid; that defendant did not safely carry and deliver the horses to plaintiff; but that on the contrary by defendant's negligence the horses afterward, on the same day, at Imperial, became and were wholly lost to plaintiff. In the second count, after making similar allegations as to defendant being a common carrier and receiving the horses for

APPEAL FROM CIRCUIT COURT,

COOK COUNTY,

270 I.A. 628

THE PEOPLE OF THE STATE OF ILLINOIS,
Plaintiff,
vs.
JAMES H. HARRIS,
Defendant.

THE JURY ON THIS MATTER WILL BE THE OPINION OF THE COURT.

By this appeal defendant seeks to reverse a judgment

rendered against it on May 14, 1932, for \$2000, following the

verdict of a jury, in an action of trespass on the case for

damages, commenced by the plaintiff by file of certain

horses, the property of plaintiff, while in defendant's care as

imperial, defendant. There have been two trials of the case.

The first, in February, 1932, resulted in a verdict against

defendant for the same amount, but a new trial was granted.

Plaintiff's declaration as amended consisted of four

counts, two of which defendant pleaded the general issue.

In the first count it is averred that on January 7, 1932,

defendant possessed and operated a tavern and was a common

carrier for hire and on said day plaintiff as Imperial,

defendant, caused to be delivered to it, and it received, defendant

horses belonging to plaintiff to be safely carried from Imperial

to Riverside, California, and at the last named place to be safely

delivered to plaintiff for a reward paid; that defendant did not

safely carry and deliver the horses to plaintiff; but that on the

same day, at Imperial, became and were wholly lost to plaintiff.

In the second count, after making similar allegations as to

defendant being a common carrier and receiving the horses for

the shipment mentioned, it is averred in substance that on said day and at said place defendant, disregarding its duty, failed to provide a safe and suitable car for the transportation of the horses; that by reason thereof on January 7, 1929, the horses were destroyed by fire, killed and became wholly lost to plaintiff; and that the fire was not due to any negligence of plaintiff or her agents. In the third and fourth counts, as amended, there are similar allegations. The gist of the third count is that by reason of defendant's negligence the horses, on said day and at said place, "were suffocated and burned to death by fire and became and were wholly lost to plaintiff." In the fourth count it is averred that on the day mentioned defendant, disregarding its duty, "failed to provide proper facilities for the unloading of the horses while the car remained in its yards at Imperial;" that a fire occurred in said yards, causing the burning or destruction of the car in which the horses were loaded; and that as a result of defendant's failure to provide said proper unloading facilities, the horses were suffocated and burned to death and were wholly lost to plaintiff. In the declaration the damage sustained by plaintiff is alleged to be the sum of \$2950.

Plaintiff was a witness in her own behalf, and her father, George H. Getzendaner, her mother Nora J. Getzendaner, and one Magnus Hansen, an employee on the Getzendaner farm at Champion, Nebraska, testified for her. She also introduced in evidence a bill of lading, or "Uniform Live Stock Contract," dated "Imperial, Neb., Jan. 7, 1929," signed by defendant by its agent, one Beasley, at Imperial, and delivered about 7 o'clock, p. m. on the day of its date to George H. Getzendaner at Imperial. No evidence was introduced by defendant. At the close of plaintiff's evidence defendant's motion for a directed verdict in its favor was denied. Thereupon the jury were instructed by the court. Some of the given in-

the witness mentioned, it is averred in substance that on said

day and at said place defendant, disregarding the duty, failed

to provide a safe and suitable box for the transportation of the

horses; that by reason thereof on January 7, 1922, the horses

were destroyed by fire, killed and became wholly lost to plaintiff;

and that the fire was not due to any negligence of plaintiff or her

agents. In this case plaintiff recovered an amount of money for

similar allegations. The gist of the third count is that by reason

of defendant's negligence the horses, on said day and at said place,

"were unloaded and burned to death by fire and became and were

wholly lost to plaintiff." In the fourth count it is averred that

on the day mentioned defendant, disregarding the duty, failed to

provide proper facilities for the unloading of the horses while the

are remained in the yards at Imperial; that a fire occurred in said

yards, causing the burning or destruction of the cars in which the

horses were loaded; and that as a result of defendant's failure to

provide said proper unloading facilities, the horses were unloaded

and burned to death and were wholly lost to plaintiff. In the

conclusion the charge contained by plaintiff is alleged to be the

sum of \$1000.

Plaintiff was a witness in her own behalf, and her father,

George H. Defendant, her mother, Mrs. J. Defendant, and one

John Hanson, an employee on the Defendant's farm at Oxnard,

California, testified for her. She also introduced in evidence a bill

of lading, on "National Live Stock Company," dated "Imperial, Cal.,

Jan. 7, 1922," signed by defendant by the agent, one Hensley, as

agent, and delivered about 7 o'clock, p. m. on the day of the

fire to George H. Defendant at Imperial. No evidence was introduced

by defendant. At the close of plaintiff's evidence defendant's

motion for a directed verdict in his favor was denied. Thereupon

the jury were instructed by the court. Some of the given in-

instructions were offered by defendant. And defendant requested that the jury make a special finding in answer to the following question: "Do you find from the evidence that the lantern caused the fire which destroyed plaintiff's property?" The court submitted the question to the jury and they answered it "No," returning the answer as a special finding, in addition to the general verdict against defendant for \$2950, as first above mentioned.

In the bill of lading or contract, defendant is designated as the "Carrier" and George H. Getzendaner as the "Shipper." The mentioned shipment (14 horses) is "consigned to Eleanor Getzendaner" and the mentioned "destination" is "Riverside, Calif." On the face of the contract is the statement:

"THIS AGREEMENT WITNESSETH, That the carrier has received from the shipper, subject to the classifications and tariffs in effect on the date of issue of this agreement, the live stock described below, in apparent good order, * * consigned and destined as indicated below, which the carrier agrees to carry to its usual place of delivery at said destination, * *. It is mutually agreed * * that every service to be performed and every liability incurred in connection with said shipment shall be subject to all the conditions, whether printed or written, herein contained, including the conditions on back hereof, and which are agreed to by the shipper and accepted for himself and his assignor."

Among the printed "Conditions" on the back of the contract are the following:

"Sec. 1 (b). Unless caused by the negligence of the carrier or its employees, no carrier shall be liable for or on account of any injury or death sustained by said live stock occasioned by any of the following causes: Overloading, crowding one upon another, escaping from cars, pens, or vessels, kicking or goring or otherwise injuring themselves or each other, suffocation, fright, or fire caused by the shipper or the shipper's agent, heat or cold, changes in weather or delay caused by stress of weather or damage to or obstruction of track or other causes beyond the carrier's control."

"Sec. 4 (a). The shipper at his own risk and expense shall load and unload the live stock into and out of the cars, * *. In case any person shall accompany the live stock in charge of same, he shall take care of, feed and water the live stock while being transported, whether delayed in transit or otherwise, * *."

On the back of the contract is a "separate contract with the man in charge of the live stock." It is dated "Imperial,

and the material "Identification" as "Riverbank, Calif." On the face of the envelope is the statement:

as the "Garrison" and George M. Garrison as the "Whisper". The contents of the envelope (25 letters) is "addressed to Thomas Garrison" and the material "Identification" as "Riverbank, Calif." On the face of the envelope is the statement:

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Among the writers "Lullaby" on the back of the cover -

REPRODUCED FROM THE ORIGINAL

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[illegible]

the man in charge of the "Kee" school. It is a school "Kee" school.

Feb., Jan. 7, 1929," is signed by Magnus Hanson, and is in part as follows:

"In consideration of the carriage of the undersigned upon a freight train or vessel in charge of the live stock mentioned in the within contract, * * the undersigned hereby voluntarily assumes all risk of accident or damages to his person or property, * *; and agrees that whenever he shall leave the caboose and pass over, or along the cars or track he will do so at his own risk of personal injury, * *."

Plaintiff's theory on the trial was that defendant was liable to her for the loss of the horses as a common carrier or insurer, and also as a bailee or warehouseman. Defendant's counsel, in here seeking to reverse the judgment, contend that under the facts disclosed defendant should not be held liable as an insurer, because (a) the issuance of the bill of lading is not conclusive to establish a delivery of the horses to it or its liability as a common carrier; (b) its agent at Imperial, Nebraska, was not notified that the loading of the horses into the car had been completed; (c) the shipper had not relinquished control over the horses; and (d) there was insufficient proof of the delivery to defendant of the horses, ready for immediate shipment. And counsel further argue that "even if the common carrier relation existed it would have been incumbent upon plaintiff to prove (which she did not do) that the fire was caused by defendant's negligence because the horses were in the charge of shipper's caretaker." Plaintiff's undisputed evidence disclosed the following facts in substance:

The Getzendaners lived on a farm at Champion, Nebraska, about ten miles from Imperial. They were engaged in farming and the raising of stock. Plaintiff was the owner of the horses in question. Their fair, market value was at least the sum of \$2950, the amount for which she brought suit. Early in January, 1929, she was in Riverside, California, arranging for an exhibition there of certain of her horses which were then on the Nebraska farm. She notified defendant's agent at Imperial, which is the nearest

shipping point to Champion, that she soon would ship a carload of horses from Imperial to Riverside, and requested him to procure a box-car for that purpose. Defendant's agent procured the car and had it in readiness for the proposed shipment. Plaintiff arranged with her father, George H., to attend to the bringing of the horses (14 of them) from the farm to Imperial and loading them on the car. The horses arrived at Imperial on Sunday, January 6th, and, by defendant's agent's directions, they were put in defendant's stock yards, near the depot. During Monday, January 7th, George H. Getzendaner and Magnus Hanson (who was to accompany the horses as caretaker on the trip to Riverside) had conversations with defendant's agent as to the details of loading the horses into the car. Because both loading chutes were then being used to load cattle for shipment in other cars, it was ascertained that the horses could not be loaded from the stock yards ^{and,} by said agent's directions, the particular car into which the horses were to be loaded was placed at an automobile loading platform, also near the depot. During the day Getzendaner and Hanson constructed partitions or stalls in the car, obtained straw for bedding and otherwise prepared the car for the horses. About 7 o'clock in the evening, the bill of lading or contract, above mentioned, was signed and delivered to George H. Getzendaner at the depot. Defendant's agent said that the horses should be loaded into the car that evening, so that the car could be moved out with the freight train leaving about 5 o'clock the next morning (January 8th.) Immediately after the contract was signed Getzendaner began the work of leading the horses out of the stock yards and loading them into the car. In this work he was assisted by Mrs. Getzendaner and Hanson, and thereafter all of the horses were loaded into the car. Some were tied inside of particular partitions and others not. Inside of one partition were placed hay and bags of feed for the horses for use on the contemplated

original point to shipping, and the men would ship a number of
horses from Imperial to Riverdale, and requested him to procure a
part for the horses. The horses were then taken to the
shed in readiness for the proposed shipment. The horses were
left in the shed, and it was found that the horses of the horses
(14 of them) from the farm to Imperial and loading them on the cars.
The horses arrived at Imperial on Sunday, January 28, and by
Wednesday's evening's shipment, they were put in Imperial's shed
ready for the depot. During Monday, January 27, George H.
Henderson and Eugene Hansen (who was to accompany the horses on
shipment in the trip to Riverdale) had conversations with
agent as to the details of loading the horses into the box.
Between both loading sheds were then being used to load cattle
for shipment in other cars. It was ascertained that the horses could
not be loaded from the stock yards by agent's permission, the
particular car into which the horses were to be loaded was placed
at an accessible loading platform, also near the depot, during
the day. Henderson and Hansen conversed with agent as to details in
the car, obtained orders for loading and otherwise prepared the car
for the horses. About 7 o'clock in the evening, the bill of lading
or contract, above mentioned, was signed and delivered to George H.
Henderson at the depot. Henderson's agent said that the horses
should be loaded into the car that evening, so that the car could be
moved out with the freight train leaving about 8 o'clock the next
morning (January 29th). Immediately after the contract was signed
Henderson began the work of loading the horses out of the stock
yards and loading them into the car. It was found that the horses
by that Henderson and Hansen, and Henderson all of the horses
were loaded into the car. There were also inside of particular
positions and others not. Inside of one position were placed
hay and bags of feed for the horses for use on the contemplated

trip. Inside the car also were placed bedding for Hanson and a trunk, containing his belongings and medicine and bandages for the horses. In another part of the car was placed a water barrel, to be filled with water for the horses. While the loading was progressing, and because there were no other lights in or immediately around the car, a lighted lantern was hung on a nail inside the car near the center. Finally everything was in readiness for the contemplated trip, except the obtaining of water to fill the water barrel. And about 10 o'clock, p. m. on January 7th, after several empty cans had been obtained at defendant's depot, Mr. and Mrs. Getzenaner and Hanson left the car in an auto-truck to obtain water to put into the water barrel. When they left, the lighted lantern was hanging in its place, the car door was open and the gang plank, connecting the car with the loading platform, was still in place. During their absence a fire started in the car from an unknown cause, resulting in the burning or suffocating and killing of all the horses. The Getzenaners and Hanson, during the progress of the fire, returned with the water in their auto-truck to the scene. They made unsuccessful efforts to save some of the horses. At that time the lighted lantern was still hanging on the nail inside the car.

Considering the pleadings and the evidence, substantially as above outlined, we are of the opinion that the jury were amply justified in returning the verdict that they did against defendant, and that the judgment of the court should be sustained on the theory that defendant was liable, as a common carrier or insurer, to plaintiff for the loss of her horses. In speaking of the liability of common carriers our Supreme Court in the early case of Fisher v. Glibee, 12 Ill. 344, 350, said: "They are held liable for all damage to goods intrusted to their care, unless the loss is occasioned by inevitable accident, not brought about by human

... Inside the car were placed...
... In another part of the car was placed a water bucket...
... and because there were no other lights in or immediately
around the car, a lighted lantern was hung on a nail inside the
car near the center. Finally everything was in readiness for the
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barrel. And about 10 o'clock, P. M. on January 28th, after several
empty cans had been obtained at defendant's depot, Mr. and Mrs.
defendant and Hanson left the car in an auto-truck to obtain water
to put into the water barrel. When they left, the lighted lantern
was hanging in the place, the car door was open and the gang plank
connecting the car with the loading platform was still in place.
During their absence a fire started in the car from an unknown cause,
resulting in the burning or destruction and killing of all the
persons. The defendants and Hanson, during the progress of the
trip, returned with the water in their auto-truck to the house.
They made unsuccessful efforts to save some of the horses. At
that time the lighted lantern was still hanging on the wall in-
side the car.
... considering the...
... as above outlined, we are of the opinion that the jury were fully
justified in returning the verdict that they did against defendant,
and that the judgment of the court should be sustained as the lawfully
that defendant was liable as a common carrier of passengers to him-
self for the loss of her horses. In speaking of the liability
of common carriers and passengers there is the early case of Little v.
Barrett, 12 Ill. 261, 262, 263, 264, 265, 266, 267, 268, 269, 270, 271, 272, 273, 274, 275, 276, 277, 278, 279, 280, 281, 282, 283, 284, 285, 286, 287, 288, 289, 290, 291, 292, 293, 294, 295, 296, 297, 298, 299, 300, 301, 302, 303, 304, 305, 306, 307, 308, 309, 310, 311, 312, 313, 314, 315, 316, 317, 318, 319, 320, 321, 322, 323, 324, 325, 326, 327, 328, 329, 330, 331, 332, 333, 334, 335, 336, 337, 338, 339, 340, 341, 342, 343, 344, 345, 346, 347, 348, 349, 350, 351, 352, 353, 354, 355, 356, 357, 358, 359, 360, 361, 362, 363, 364, 365, 366, 367, 368, 369, 370, 371, 372, 373, 374, 375, 376, 377, 378, 379, 380, 381, 382, 383, 384, 385, 386, 387, 388, 389, 390, 391, 392, 393, 394, 395, 396, 397, 398, 399, 400, 401, 402, 403, 404, 405, 406, 407, 408, 409, 410, 411, 412, 413, 414, 415, 416, 417, 418, 419, 420, 421, 422, 423, 424, 425, 426, 427, 428, 429, 430, 431, 432, 433, 434, 435, 436, 437, 438, 439, 440, 441, 442, 443, 444, 445, 446, 447, 448, 449, 450, 451, 452, 453, 454, 455, 456, 457, 458, 459, 460, 461, 462, 463, 464, 465, 466, 467, 468, 469, 470, 471, 472, 473, 474, 475, 476, 477, 478, 479, 480, 481, 482, 483, 484, 485, 486, 487, 488, 489, 490, 491, 492, 493, 494, 495, 496, 497, 498, 499, 500, 501, 502, 503, 504, 505, 506, 507, 508, 509, 510, 511, 512, 513, 514, 515, 516, 517, 518, 519, 520, 521, 522, 523, 524, 525, 526, 527, 528, 529, 530, 531, 532, 533, 534, 535, 536, 537, 538, 539, 540, 541, 542, 543, 544, 545, 546, 547, 548, 549, 550, 551, 552, 553, 554, 555, 556, 557, 558, 559, 560, 561, 562, 563, 564, 565, 566, 567, 568, 569, 570, 571, 572, 573, 574, 575, 576, 577, 578, 579, 580, 581, 582, 583, 584, 585, 586, 587, 588, 589, 590, 591, 592, 593, 594, 595, 596, 597, 598, 599, 600, 601, 602, 603, 604, 605, 606, 607, 608, 609, 610, 611, 612, 613, 614, 615, 616, 617, 618, 619, 620, 621, 622, 623, 624, 625, 626, 627, 628, 629, 630, 631, 632, 633, 634, 635, 636, 637, 638, 639, 640, 641, 642, 643, 644, 645, 646, 647, 648, 649, 650, 651, 652, 653, 654, 655, 656, 657, 658, 659, 660, 661, 662, 663, 664, 665, 666, 667, 668, 669, 670, 671, 672, 673, 674, 675, 676, 677, 678, 679, 680, 681, 682, 683, 684, 685, 686, 687, 688, 689, 690, 691, 692, 693, 694, 695, 696, 697, 698, 699, 700, 701, 702, 703, 704, 705, 706, 707, 708, 709, 710, 711, 712, 713, 714, 715, 716, 717, 718, 719, 720, 721, 722, 723, 724, 725, 726, 727, 728, 729, 730, 731, 732, 733, 734, 735, 736, 737, 738, 739, 740, 741, 742, 743, 744, 745, 746, 747, 748, 749, 750, 751, 752, 753, 754, 755, 756, 757, 758, 759, 760, 761, 762, 763, 764, 765, 766, 767, 768, 769, 770, 771, 772, 773, 774, 775, 776, 777, 778, 779, 780, 781, 782, 783, 784, 785, 786, 787, 788, 789, 790, 791, 792, 793, 794, 795, 796, 797, 798, 799, 800, 801, 802, 803, 804, 805, 806, 807, 808, 809, 810, 811, 812, 813, 814, 815, 816, 817, 818, 819, 820, 821, 822, 823, 824, 825, 826, 827, 828, 829, 830, 831, 832, 833, 834, 835, 836, 837, 838, 839, 840, 841, 842, 843, 844, 845, 846, 847, 848, 849, 850, 851, 852, 853, 854, 855, 856, 857, 858, 859, 860, 861, 862, 863, 864, 865, 866, 867, 868, 869, 870, 871, 872, 873, 874, 875, 876, 877, 878, 879, 880, 881, 882, 883, 884, 885, 886, 887, 888, 889, 890, 891, 892, 893, 894, 895, 896, 897, 898, 899, 900, 901, 902, 903, 904, 905, 906, 907, 908, 909, 910, 911, 912, 913, 914, 915, 916, 917, 918, 919, 920, 921, 922, 923, 924, 925, 926, 927, 928, 929, 930, 931, 932, 933, 934, 935, 936, 937, 938, 939, 940, 941, 942, 943, 944, 945, 946, 947, 948, 949, 950, 951, 952, 953, 954, 955, 956, 957, 958, 959, 960, 961, 962, 963, 964, 965, 966, 967, 968, 969, 970, 971, 972, 973, 974, 975, 976, 977, 978, 979, 980, 981, 982, 983, 984, 985, 986, 987, 988, 989, 990, 991, 992, 993, 994, 995, 996, 997, 998, 999, 1000

agency, the public enemy, or the owner of the goods. It makes no difference whether the carrier has done all in his power to prevent the loss or not; his responsibility is still the same. He is the absolute insurer of the property against all losses, except those occasioned by the causes above specified." In Porter v. Chicago, etc. R. Co., 20 Ill. 407, 412, it is said: "The fact that the goods in the car were destroyed by an accidental fire, would not excuse the defendants from liability as common carriers, * *. Their undertaking as common carriers holds them liable for all losses, except those occasioned by the act of God or the public enemy." In 1 Hutchinson on Carriers (3rd Ed.) pp. 109-10, sec. 113, in discussing when the liability of a common carrier begins, it is said:

"But if the delivery be made at the warehouse or other place of business of the carrier for an early transportation as can be made in the course of the carrier's business, and subject only to such delays as may necessarily occur in awaiting the departure of trains, vessels, or other vehicles of transportation, or from the performance of prior engagements by him, he becomes, the moment the delivery is made, a carrier as to the goods, and his responsibility as such at once attaches. (Citing Grand Tower etc. Co. v. Ullman, 89 Ill. 244.) * * and the general and well-settled rule is, that the liability of the common carrier commences whenever and as soon as the goods have been delivered to and accepted by him solely for transportation, although they may not be put immediately in itinere, but are, at first, for his own convenience and preparatory to the voyage or journey for which they are intended, temporarily deposited in his wharf or store room. In such cases, the deposit is a mere accessory to the carriage, and does not postpone his liability as common carrier to the time when they shall be actually put in motion towards their place of destination." (Citing North German Lloyd S. S. Co. v. Bullen, 111 Ill. App. 426.)

As to the contention of defendant's counsel, that the issuance of the bill of lading in the present case is not conclusive to establish a delivery of the horses to defendant or its liability as a common carrier, we do not think that the contention, under the evidence, is supported by the law. In Yazoo, etc. R. Co. v. Nichols & Co., 256 U. S. 546, it appears that in November, 1917, the railroad company had issued to the shipper a bill of lading for certain bales of cotton which had been loaded into a box car at a point in

Mississippi for shipment to a point in Tennessee; that before the loaded car had been attached to any train or engine it was destroyed by fire; that a judgment had been obtained against the railroad company for the loss; and that the judgment was affirmed. In the course of its opinion the court said (p. 546): "But, at a station where there is a regularly appointed agent, it would be obviously unreasonable to place upon the shipper, after a bill of lading has issued, the risks attendant upon the loaded car remaining on the public siding because it has not yet been convenient for the carrier to start it on its journey."

Equally without merit, in our opinion, is defendant's counsels' further contention that defendant under the evidence cannot be held liable as a common carrier for the loss of the horses because, after their loading into the car had been completed by plaintiff's agents, defendant's agent (Beezley) was not notified of that fact. The contention ignores the fact that Beezley, when he issued the bill of lading, knew that during the evening the horses would be taken from the yards and loaded into the car by plaintiff's agents, because of his directions that this be done so that the loaded car might start on its journey early the following morning, as desired by plaintiff's agents. (See Pittsburg, etc. R. Co. v. American Tobacco Co., 104 U. S. Rep. (Ky. App.) 377, 378-9.) And we do not think there is any substantial merit in counsels' further contentions, that when the fire occurred plaintiff's agents had not sufficiently relinquished control over the horses, and that the car, in which the horses were, was not ready for immediate shipment. These contentions seemingly are predicated on the fact that plaintiff's agents had not yet placed water in the water barrel in the car. It seems clear to us that after the horses were put into defendant's car, as directed by defendant's agent, Beezley, they were under the control of defendant as a carrier. (See Illinois

Central R. Co. v. Myser & Co., 38 Ill. 354, 361; Bratt v. Railway Co., 95 U. S. 43, 44; Hannibal Railroad v. Swift, 79 U. S. (12 Wall) 262, 273.)

And we do not think that, because it appears that when the horses actually started on the contemplated journey they were during that journey to be looked after by plaintiff's caretaker (Hanson), it was incumbent upon plaintiff to show that the fire (which caused plaintiff's loss) resulted from the negligence of defendant or its agents, as is argued by counsel.

Holding, as we do, that under the facts disclosed and the law applicable thereto the judgment appealed from was warranted on the theory of defendant's liability to plaintiff as a common carrier or insurer, it is unnecessary for us to consider whether defendant was also liable as a bailee or warehouseman.

For the reasons indicated the judgment of the circuit court of May 14, 1932, for \$2950, against defendant is affirmed.

AFFIRMED.

Connlan, P. J., and Sullivan, J., concur.

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And we do not think that because it appears that when
the horses actually started on the contemplated journey they were
having that journey to be looked after by plaintiff's veterinarian
(Keweenaw), it was incumbent upon plaintiff to show that the trip
(which caused plaintiff's loss) resulted from the negligence of
defendant or its agents, as is argued by counsel.

Saying, as we do, that under the facts disclosed and
the law applicable thereto the judgment appealed from was warranted
on the theory of defendant's liability to plaintiff as a common
carrier of horses, it is unnecessary for us to consider whether
defendant was also liable as a bailee or warehouseman.
The facts herein indicated the judgment of the circuit
court at May 14, 1900, against defendant is affirmed.

APPROVED,

... ..

36353

THERESA M. GORTON et al.,
Appellants,

v.

VILLAGE OF BEVERLY, a municipal corporation; WILLIAM S. MAXWELL, president of the Village; CITY OF CHICAGO, a municipal corporation; MORRIS ELLER, city collector of the City; and GEORGE F. HARDING, county collector of Cook county, Illinois, Appellees.

APPEAL FROM

CIRCUIT COURT,
COOK COUNTY.

270 I.A. 628⁵

MR. JUSTICE GRIDLEY DELIVERED THE OPINION OF THE COURT.

On November 10, 1930, certain property owners filed a bill in the circuit court of Cook county to enjoin defendants from collecting a special assessment levied by the Village of Beverly to pay the cost of grading, curbing and paving certain streets in the Village. Prior to the filing of the bill the Village became a part of the City of Chicago by annexation. On February 5, 1931, the court allowed certain other property owners to become co-complainants and ordered that the bill be amended by adding their names as such. To the amended bill all defendants joined in a general demurrer, and on June 17, 1932, after hearing arguments of respective counsel, the court sustained the demurrer and dismissed the bill for want of equity. The present appeal followed.

The salient allegations of the bill are as follows:

That during the year 1926, Harold J. McElhinny and William S. Maxwell formed a syndicate for the purpose of purchasing and subdividing a tract of land (describing it), containing about 34 acres; that the tract was purchased and subdivided, and the title to the 568 lots was taken in trust by a certain bank, as trustee; that thereafter contracts for the sale of some of the lots were made; that McElhinny and Maxwell retained a certain reversionary interest in the profits and unsold lots; that in the contracts of sale of the lots the trustee reserved the right to pave the streets and alleys in the subdivision, "the cost of which should be paid by the individual purchasers;" that in the spring of 1928, Maxwell caused plans and specifications to be made for grading, curbing and paving the streets

and alleys, advertised for bids for the doing of the work and individually entered into certain contracts therefor; that about June 28, 1928, the work was commenced, and during July, 1928, the "greater portion" of the work was completed; that on July 16, 1928, a petition was filed in the county court for the incorporation as a village of said 84 acre tract of land and certain adjacent territory; that on July 31st, the election on the question of said incorporation was held, and on August 29th, a declaration of the organization of the "Village of Beverly" was filed in the county court; and that on October 2, 1928, officers of the new Village, with Maxwell as president thereof, were elected.

That on October 19, 1928, a recommendation for grading, curbing and paving the streets and alleys of the subdivision was submitted by the board of local improvements of the Village to its Board of Trustees; that the work proposed in the recommendation to be done was the same as that already partially done under said contracts with Maxwell personally; that on October 27th an ordinance for said grading, etc., work, based upon said recommendation, was passed by the Board of Trustees of the Village; that on November 10, 1928, a petition was filed on behalf of the Village in the superior court of Cook county, asking for confirmation of a special assessment, based upon said recommendation and ordinance; that publication of required notices was made in the "Greater Kiles Center News, a newspaper published in the extreme northwest corner of Cook county;" that the publications, while made "for the purpose of literal compliance with the statutes," at the same time "greatly diminished the possibility of any of the property owners, or parties interested, in the subdivision from hearing of or receiving any notice of said proceedings;" that Maxwell and McElhinny caused the general taxes for the year 1927 on all of the lots in the subdivision to be paid in the name of McElhinny, "for the purpose of having his name appear as owner of all the property of the subdivision in the tax records of Cook county, so that the notice of the application for special assessment would be sent to him as to all of the lots, and so that in this way strict compliance with the statutes of the State might be had, while at the same time the true owners of said property would not have notice, or means of knowing of, said assessment;" that Maxwell, as president, knew that McElhinny "was not the owner of the property," and knew that the reason for the payment of said taxes in McElhinny's name on all of the lots in the subdivision, "was to defeat the true purpose of the statutes of the State, requiring notice to be sent to the last tax owner;" and that, "as the result of the fraud of said Maxwell," complainants did not know that a Village had been formed in the territory, or that an application for a special assessment had been filed in the superior court, and thereby complainants were prevented from discovering the true facts.

That on January 5, 1929, a judgment of confirmation of the special assessment was entered in the superior court, confirming the same as to complainants' property as well as other property in the subdivision, and that the "first knowledge" complainants had of said proceedings "was in September, 1930, when bills for the first installment of the assessment were sent to them."

That complainants are the respective owners of certain lots situated within the Village of Beverly and within said 84 acre subdivision, and "were such owners on and prior to November 10, 1928 (i.e., the day said petition for the confirmation of the assessment was filed), and have been such owners since that time," as shown by an attached schedule made a part of their bill. (In the schedule certain lot and block numbers are set forth opposite the

name of a particular complainant, but the respective times when title was acquired are not stated.)

That the special assessment levied by the superior court against the respective pieces of property "is absolutely void and of no force and effect whatsoever, in that it is an attempt on the part of said Village to levy an assessment for work done prior to the ordinance authorizing such work, and was not done under authority of the Board of Local Improvements of said Village or under contract with said Board;" that said grading, etc., work "was in fact done prior to the organization of said Village and under private contract between the contractors and said Maxwell, individually and personally;" and that "such is not a proper subject for a special assessment of said Village."

That notwithstanding the fact that the special assessment is void and of no force and effect, the Village "has sent out bills, seeking payment of the first installment of said special assessment" which bills complainants have received; that the Village has caused the books as to said assessment to be turned over to the defendant, Harding, as collector of Cook county, for the purpose of enforcing the collection of the first installment of said assessment; that unless its collection is enjoined Harding will sell the lots at tax sale and, upon failure of redemption, will cause deeds to issue on the lots and deliver tax titles to the purchasers, which will cause complainants' titles to the respective lots to be clouded and otherwise cause them serious and irreparable loss, etc:

The prayer of the bill is in substance that defendants, their agents and attorneys, be perpetually enjoined from collecting or attempting to collect any of the installments of said special assessment; that the assessment against complainants' property be set aside; and that they have such other and further relief as equity may require, etc.

Counsel for complainants, in here urging a reversal of the decree of the superior court (which, after defendants' general demurrer to the bill was sustained, directed the dismissal of the bill for want of equity) state in their brief: "The question presented is whether or not a judgment of confirmation of a special assessment, where the construction provided for by the assessment was done prior to the passage of the ordinance, can be collaterally attacked, and, if so, whether or not equity will assume jurisdiction to enjoin the collection of such assessment, where irreparable injury and a multiplicity of suits will result in the event equity does not assume such jurisdiction." And counsel contend in sub-

stance that, under the facts as alleged in the bill, the judgment of confirmation of January 5, 1929, can be collaterally attacked in this equity proceeding, and that the superior court should have overruled defendants' demurrer to the bill and required an answer and a hearing on the merits. Counsel, however, state in their reply brief: "It is true that the special assessment record on its face appears to be regular - the irregularity consisting of the payment of the 1927 taxes in the name of McElhinny, so as to have his name appear as owner and then sending notice to him, and the fact that this work had already been done while the petition appears to be for work to be done in the future."

The main contention of defendants' counsel is that said judgment of confirmation is res adjudicata of all objections and questions which were raised in the superior court or which might have been raised, and that said judgment is not subject to collateral attack except for want of jurisdiction in the court to enter it, which must appear on the face of the record of said superior court.

After considering the allegations of complainants' bill and reviewing several adjudicated cases, we are of the opinion that the circuit court did not err in sustaining defendants' demurrer to the bill and dismissing it for want of equity. In Meehan v. Granite City Park District, 347 Ill. 364, 369-70, it is said: "The judgment of the county court was res adjudicata of all objections and questions which were raised in that court or which might have been raised. (Citing cases.) The collection of a special assessment will not be enjoined where the bill sets forth no grounds for relief other than the grounds which were available in the county court. (Citing Coagrove v. City of Chicago, 235 Ill. 358, 363, and Sumner v. Village of Milford, 214 Ill. 398, 392) * *. After the judgment of confirmation has been entered in the county court the only objection available to the land owner is such as goes to the jurisdiction of

...that, under the Treaty as alleged in the Bill, the judgment
of confirmation of January 2, 1907, was not collectively attended
in this equity proceeding, and that the opinion court should have
examined defendant's statement in the Bill and rejected an answer
and a hearing on the merits. However, there is still
regly but: "It is true that the special statement issued on 1907
... is in regular - the temporary committee of the ...
ment of the 1907 cases in the name of McKinstry, as we do have his
name appear as owner and then sending notice to him, and the fact
that this was not already done when the petition was filed in
so far as to be done in the future."
The main contention of defendant's counsel is that while
judgment of confirmation is not subject to all objections and
questions which may arise in the equity court in which it
has been made, and that said judgment is not subject to collective
attack except for want of jurisdiction in the court so when it
is made with respect to the fact of the equity court's jurisdiction,
it is conclusive the allegations of complainant's Bill
and setting forth the alleged facts, we are of the opinion that
the equity court did not err in examining defendant's answer to
the Bill and dismissing it for want of equity. In Hickman v. ...
Comptroller of the Treasury v. ... 1911, 202 U.S. 146, it is said: "The
judgment of the equity court was not subject to all objections
and questions which may arise in that court or which may be
brought before it. (Citing cases.) The collection of a special statement
will not be enjoined where the Bill sets forth no grounds for relief
other than the grounds which were available in the equity court."
(Citing Garvey v. City of Chicago, 202 Ill. 382, 383, and James v. ...
Illinois v. ... 1911, 202 U.S. 146, 147. The judgment of
confirmation has been entered in the equity court the only objection
available to the land owner is such as goes to the jurisdiction of

the county court to render the judgment of confirmation, and such lack of jurisdiction must appear upon the face of the record of the court in which the judgment was rendered." From the allegations of complainants' bill it appears that, pursuant to an ordinance of the Village (passed October 27, 1928) and pursuant to the petition, filed by the Village in the superior court on November 10, 1928, the special assessment was levied, and that on January 5, 1929, a judgment of confirmation of the assessment was entered. It is not alleged in the bill that there is anything upon the face of the record of the proceedings in the superior court that constitutes a good defense to the assessment. Indeed, counsel for complainants state in their brief that said record "on its face appears to be regular." Furthermore, it does not appear from the bill that a complete improvement is not described in the ordinance. If, as alleged in the bill, at the time the ordinance was passed, certain portions of the work had been done those facts were available as a defense to the property owners in the superior court from November 10, 1928 (when the Village filed its petition) to January 5, 1929, (the date the judgment for confirmation was entered.) Furthermore, the allegations of the bill as to notices being sent to McKhinny tend to disclose a compliance with the statute as to notice. It is alleged that complainants only became the owners of their respective lots about November 10, 1928, (the date the petition for confirmation of the assessment was filed.) It is not alleged how long before that date they became the owners. And in Springer v. City of Chicago, 303 Ill. 356, 360, it is held that "the full compliance with the statute shown by the affidavit gave the county court jurisdiction of the property to confirm the assessment, even though the appellee, the owner, did not receive any notice." And the fact that there are allegations in the bill tending to show irregularities in the publication of required notices (i.e., in a newspaper remote from the Village of Beverly) is, in our

The County Court is under the impression that the
lack of jurisdiction was upon the face of the record at
the court in which the judgment was rendered. Upon the allegations
of complainant, still it appears that, pursuant to an ordinance of
the Village (passed October 27, 1908) and pursuant to the petition
filed by the Village in the superior court on November 10, 1908, the
special assessment was levied, and that on January 5, 1909, a judge
went to collection of the assessment was entered. It is not alleged
in the bill that there is anything upon the face of the record of the
proceedings in the superior court that constitutes a good defense to
the assessment. Indeed, counsel for complainant state in their
brief that said record "in its face appears to be regular." Further-
more, it does not appear from the bill that a complete improvement is
not described in the ordinance. It is alleged in the bill, at the
time the ordinance was passed, certain portions of the work had been
done these facts were available as a defense to the property owners
in the superior court from November 10, 1908 (when the Village filed
its petition) to January 5, 1909. (The date the judgment for collec-
tion was entered.) Furthermore, the allegations of the bill as to
notice being sent to defendant tend to disclose a compliance with
the statute as to notice. It is alleged that complainant only became
the owner of their respective lots about November 10, 1908, (the date
the petition for collection of the assessment was filed.) It is
not alleged that defendant had any notice of the assessment. The
bill contains no averment that defendant was notified of the assessment
in October or prior to January 5, 1909, and it is said that
"the bill contains no averment that defendant was notified of the assessment
the County Court's jurisdiction of the property as to the assessment."
and the fact that there are allegations in the bill tending to
show irregularities in the collection of the assessment (1908)
in a newspaper remote from the Village of Keweenaw, 1908 in an

opinion, of no force as affecting the jurisdiction of the superior court to enter the judgment of confirmation of the assessment. In Village of La Grange Park v. Hanna, 332 Ill. 236, 241, it is said:

"The fact that there might be irregularities in the proceedings before the board of local improvements, or the board of trustees, or in the publication of the ordinance, did not deprive the court of jurisdiction over either the subject matter or the parties. If no objections are made to irregularities, omissions and failure to comply with the statute, the defects are waived and the judgment of the court is valid and not subject to collateral attack." And, we think it is significant that there are no allegations in the bill to the effect that the particular improvement was unnecessary, or the assessment excessive, or that complainants' lots were assessed for more than their proportionate share. And it is apparent from the allegations of the bill that when complainants signed contracts for the purchase of the respective lots, they and each of them knew that the adjoining streets and alleys in the subdivision were to be paved, and that the cost of the work was to be paid by the purchasers, proportionately.

The decree of the circuit court of June 17, 1932, dismissing complainants' bill for want of equity, is affirmed.

ATTORNEYS.

Scanlan, P. J., and Sullivan, J., concur.

36636

GEORGE T. JENNINGS,
Complainant and Appellee,

v.

436 WELLINGTON AVENUE BUILDING
CORPORATION, MAX H. BRAUN, I.
EDWARD BISHKOW, IDA FACTOR,
PAULINA S. ERIKSSMA, CHICAGO
TITLE & TRUST CO., as trustee,
and Unknown Owners,
Defendants.

MAX H. BRAUN and I. EDWARD
BISHKOW,
Appellants.

89 A

APPEAL FROM AN
INTERLOCUTORY ORDER OF
SUPERIOR COURT OF COOK
COUNTY, APPOINTING A
RECEIVER.

270 I.A. 629¹

MR. JUSTICE GRIDLEY DELIVERED THE OPINION OF THE COURT.

Based upon complainant's sworn bill, filed November 21, 1932, to foreclose a first trust deed on certain improved real estate in Chicago, Illinois, and upon complainant's motion for the appointment of a receiver, and after defendants had received notice of the motion, the court, on December 30, 1932, appointed John B. Kanaley as receiver of the premises, with usual powers, on condition of his filing a bond in the sum of \$10,000, and complainant filing a bond in the sum of \$1,000, with sureties, to be approved by the court. Both bonds were filed and approved on the following day. Subsequently, on January 18, 1933, by leave of court, an amended receiver's bond and an amended complainant's bond, in the same respective amounts and as of December 31, 1932, were filed and approved. On January 24, 1933, in accordance with the provisions of section 143 of the Practice Act and within apt time, Max H. Braun and I. Edward Bishkow, two of the defendants, appealed from the interlocutory order appointing the receiver by the filing of a bond with the clerk of the superior court,

RECEIVED BY THE
COMMISSIONER OF THE

Y.

AND WILLIAMSON AVENUE BUILDING
INCORPORATED, 111 N. BROAD ST.
NEW YORK, N. Y.
JANUARY 10, 1935
TITLE & FIRST OF, AS FURNISHED
AND RETURNED TO THE
RECEIVING OFFICE

RECEIVED BY THE
COMMISSIONER OF THE
JANUARY 10, 1935
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... upon complaint's return filed January
1935, to receive a first bond on certain property
and estate in Illinois, and upon complaint's motion
for the appointment of a receiver, and after defendant had
received notice of the motion, the court, on December 20, 1935,
appointed John H. Keady as receiver of the premises, with usual
powers on condition of his filing a bond in the sum of \$10,000,
and defendant filing a bond in the sum of \$1,000 with Keady,
to be approved by the court. Both bonds were filed and approved
on the following day. Subsequently, on January 10, 1935, by
leave of court, an amended receiver's bond and an amended complaint
and a bond, in the same respective amounts and on or December 21,
1935, were filed and approved. On January 24, 1935, in accordance
with the provisions of section 113 of the Practice Act and within
the time, Max H. Baum and I. Edward Bliskow, two of the defend-
ants, appeared from the information given appointing the receiver
by the filing of a bond with the clerk of the receiver court.

which was approved by that official, and on February 27, 1933, also within apt time, the appeal was perfected in this appellate court. On March 21, 1933, appellee's motion to dismiss the appeal was denied.

The salient allegations of complainant's bill are in substance that on April 3, 1928, the 436 Wellington Building Corporation (hereinafter called the Corporation) executed and delivered its 500 bonds of \$500 each, payable to bearer, with interest at 6% per annum, payable semi-annually, as evidenced by attached coupons also payable to bearer; that the bonds, representing a total indebtedness of \$250,000, matured at different dates; that four matured on October 3, 1929, and others of the first 100 bonds matured at six month intervals thereafter and until October 3, 1935, and bonds Nos. 101 to 500, inclusive, matured on April 3, 1936; that to secure the payment of the bonds and indebtedness, the Corporation, on April 3, 1928, executed and delivered its trust deed, conveying to the Chicago Title & Trust Co., as trustee, the real estate in question (describing it), together with all buildings and improvements thereon, and "together with all rents, issues or profits which shall hereafter accrue or arise from said premises;" that the trustee accepted the trusteeship and the trust deed was duly filed for record in the office of the Recorder of Deeds of Cook County, Illinois, on April 12, 1928, (copy of trust deed attached and made part of the bill); that bonds Nos. 1 to 36, inclusive, were paid, as well as all interest due on any of the bonds on or prior to April 3, 1932; that bonds, Nos. 37 to 44 inclusive, aggregating \$4,000, and maturing on April 3, 1932, have not been paid and are in default; that on October 3, 1932, interest aggregating \$6840, became due and payable, and of this \$680 only was paid, leaving a balance unpaid and in default for said interest of \$6240; that on October 3, 1932, also, bonds Nos.

which was approved by the Board of Directors, and on February 17, 1934, also within the same time, the appeal was presented to the Board of Directors. On March 21, 1934, the Board of Directors' action to dismiss the appeal was denied.

The national allegations of conspiracy in violation of the Anti-Trust Laws, which were filed on April 1, 1934, and the following matters (hereinafter called the "conspiracy") were filed and delivered to the Board of Directors of \$200 each, payable to bearer, with interest at 6% per annum, payable semi-annually, as evidenced by attached coupons also payable to bearer; that the Board, representing a total indebtedness of \$200,000, matured at different dates; that four matured on October 1, 1934, and others at the time the bonds matured at six months intervals thereafter and until October 1, 1934, and bonds Nos. 1 to 200, inclusive, matured on April 1, 1934; that to secure the payment of the bonds and interest, the Corporation, on April 1, 1934, assigned the bonds, together with the Chicago Title & Trust Co., as trustee, the trust estate in question (hereinafter called the "trust estate") together with all buildings and improvements thereon, and "together with all rents, issues or profits which shall hereafter accrue or arise from said premises"; that the trustee accepted the trust estate and the trust bonds were duly filed for record in the office of the Recorder of Deeds at Cook County, Illinois, on April 12, 1934. (copy of trust deed attached and made part of the bill); that bonds Nos. 1 to 20, inclusive, were paid, as well as all interest due on any of the bonds on or prior to April 1, 1934; that bonds Nos. 21 to 44 inclusive, representing \$4,000, and maturing on April 1, 1934, have not been paid and are in default; that on October 1, 1934, interest aggregating \$200, between then and payable, and of \$200 each were paid, leaving a balance unpaid and in default for the balance of \$200; that on October 1, 1934, also, bonds Nos.

45 to 52, inclusive, aggregating \$4,000, matured, were not paid and are in default; that by reason of the defaults and the terms of said trust deed the whole of the principal unpaid indebtedness, aggregating \$232,000, evidenced by bonds Nos. 37 to 500, inclusive, together with said unpaid interest of \$6,240, and other interest, have become due and payable; that the trust deed provided that "in case of default in making payment of any of said bonds, either of principal or interest, as and when the same become due and payable," or in case of the default in the performance of any covenant or agreement therein made by the Corporation, "then the whole of said principal sum secured hereby shall at once (without notice thereof to any person interested), at the option of the holder or holders of not less than ten per cent of the total of the principal of the then outstanding bonds, become due and payable;" that complainant is the holder of more than ten per cent of the total of the principal of the outstanding bonds, and has declared the whole of said principal sum secured by the trust deed due and payable; that the trust deed further provided that upon any such default and such declaration being made, the trustee, or the holder or holders of one or more of the then outstanding bonds, might foreclose the trust deed; that complainant, therefore, has filed this bill to foreclose for his benefit and the benefit of the other legal holders and owners of the bonds now outstanding and unpaid; that complainant has been compelled to advance, for the protection of his lien, "various sums for taxes and assessments, tax sale, fire insurance," etc., and will be compelled to advance other sums in and about the foreclosure of the trust deed, for which said sums he will be entitled to an accounting on the hearing, etc.; that the trustee has a purely naked title to, and no beneficial interest in, the premises sought to be foreclosed; that defendants "Max H. Braun, I. Edward Bishkow, Ida Factor

and Paulina S. Brielma," by certain conveyances, become and are "the owners of the equity of redemption of said premises," but their title and interest therein is subject and subordinate to the lien of complainant and the indebtedness hereby sought to be foreclosed; that other persons, unknown to complainant, claim interests in the premises and they are made parties to this bill by the name and description of "Unknown Owners;" that their interests, if any, are subject and subordinate to the rights and lien of complainant; that the premises sought to be foreclosed consist of a lot, 50 x 166 feet, improved with an eight and a six story brick building, containing 71 apartments, - 44 of which are of 3 rooms and a kitchenette each, and 27 of which are of 2 rooms and kitchenette and dinette each, equipped with steam heat and elevator; that the premises are commonly known as Nos. 434-436 Wellington avenue, Chicago; that the land and improvements "are scant and insufficient security for the indebtedness secured by said trust deed herein sought to be foreclosed;" that "the fair and reasonable market value of the land and the improvements thereon is \$222,000;" and that "it is necessary for the protection of complainant and the other bondholders that a receiver be appointed for the premises in manner and form as provided for in the trust deed and for the purpose and with the force therein specified."

The prayer of the bill is the usual one in foreclosure cases, including the prayer for the appointment of a receiver pendente lite, with the usual powers, and especially to collect the rents, issues and profits of the premises, pay taxes, redeem from tax sales, etc.

In the trust deed, made a part of the bill, it is further provided in substance that, in case of the foreclosure of the trust deed, a receiver may at once be appointed to take possession of the premises, with power to make necessary repairs,

and William H. DeLoach," by certain correspondence, Brown and the
"the owners of the equity of redemption of said premises," and their
title and interest therein as subject and subordinate to the lien
of mortgage and the independent property therein to be preserved;
that their payment, known as commission, claim interest in the
premises and they are made parties to this bill by the name and
description of "Unknown Grantor," that their interest, if any,
are subject and subordinate to the rights and lien of mortgage;
that the premises herein to be described consist of a lot, 50 x
100 feet, improved with an eight and a half story brick building,
containing 11 apartments, - 10 of which are of 2 rooms and a
bathroom each, and 11 of which are of 3 rooms and bathroom
and kitchen each, equipped with steam heat and electric light
the premises are situated in the 14th-15th Washington Avenue,
Chicago, Ill. The land and improvements "are owned and controlled
separately for the independent account by said Grantor and herein
ought to be preserved," that "the fair and reasonable market value
of the land and the improvements therein is \$100,000," and that
"it is necessary for the protection of mortgage and the other
creditors that a receiver be appointed for the premises in manner
and form as provided for in the first deed and for the purpose and
with the force therein specified."

The prayer of the bill is the usual one in foreclosure
cases, including the prayer for the appointment of a receiver
pendente lite, with the usual powers, and especially to collect
the rents, issues and profits of the premises, pay taxes, redeem
from tax sales, etc.

In the first deed, made a part of the bill, it is
further provided in substance that, in case of the foreclosure of
the first deed, a receiver may at once be appointed to take
possession of the premises, with power to make necessary repairs,

to borrow money, to collect the rents of the premises, to pay taxes and special assessments and insurance premiums, etc.; and that the appointment may be made by the court "without regard to the solvency or insolvency of the person or persons, at the time of the application, who are liable for the debt secured, and without regard to the then value of the premises."

Four days after the filing of the bill, complainant made his motion for the appointment of a receiver pendente lite, but the motion was several times continued, and before the entry of the order of December 30, 1932 (here in question), the individual defendants, Braun and Bishkow, and also Ida Factor, entered their respective appearances by solicitors. The record does not disclose that any appearance had formally been entered for the other part owner of the equity of redemption, Paulina S. Brielma, but does disclose that she, with defendants Braun and Bishkow and Ida Factor, joined in a motion by their solicitors that the hearing on the question of the appointment of a receiver be continued until a certain day.

In the order of December 30, 1932, the court, after stating that due notice of the motion for the appointment of a receiver had been given to all necessary parties, and after making findings in substantial accord with the allegations of complainant's bill, appointed said Kasahey as receiver of the premises and directed that the mortgagor and the owners of the equity of redemption turn over possession to him, and that he thereafter manage and operate the premises in such manner as will best conserve the property, etc. In the order certain usual powers are given to the receiver.

Between the date of the entry of said order and the filing of the appeal bond (January 24, 1933) with the clerk of the Superior court by defendants, Braun and Bishkow, there were numerous proceedings in the cause. Certain petitions were filed by complainant and

to borrow money, to collect the rents of the premises, to pay
 taxes and special assessments and licenses payable, and
 that the appointment was made by the court "without regard to
 the solvency or insolvency of the person or persons, at the time
 of the application, who are liable for the debt secured, and
 without regard to the then value of the premises."

Some days after the filing of the bill, complainant
 made his motion for the appointment of a receiver bonafide litter
 but the motion was several times postponed, and before the entry
 of the order of December 20, 1902 (here in question), the individual
 defendants, Brown and Robinson, and also the Western, entered their
 respective objections to the appointment. The court then set aside
 that its appointment had formerly been entered for the above
 entry of the order of December 20, 1902, and also
 directed that the said defendants Brown and Robinson, and the Western,
 should in a motion by their attorneys file the hearing on the
 question of the appointment of a receiver or complaint until a cer-
 tain day.

In the order of December 20, 1902, the court, after stating
 that the entry of the motion for the appointment of a receiver had
 been given to all necessary parties, and after making findings in
 substantial accord with the allegations of complainant's bill,
 appointed said Kimmely as receiver of the business and directed
 that the mortgage and the owners of the equity of redemption turn
 over possession to him, and that he should manage and operate
 the premises in such manner as will best conserve the property,
 etc. In the order certain annual reports are given to the receiver.
 Between the date of the entry of said order and the filing
 of the appeal bond (January 24, 1903) with the clerk of the Superior
 court of California, Brown and Robinson, their own attorneys present-
 ing in the cause. Certain petitions were filed by complainant and

the receiver, which were answered by the Corporation, defendants Braun and Bishkow, and defendant Ida Factor. On January 17, 1933, Braun and Bishkow filed their joint and several answer to complainant's bill. On January 18th they filed their written motion "to vacate the order appointing the receiver and to remove him from office." This motion was supported by their petition "in the nature of a cross bill." On the same day there was a hearing on the motion, resulting in the court entering an order denying it. There is contained in the present transcript a certificate, signed by the judge, of the proceedings on said hearing of January 18, 1933. It consists of arguments of counsel and colloquy between them and the court. Apparently the court refused to hear testimony of witnesses, offered by defendants in support of their motion.

One of the contentions urged by counsel for appellants on this appeal is that the court erred in entering the order of January 18, 1933, denying appellants' motion to vacate the order of December 30, 1932, appointing the receiver, and to remove him from office. We are without power or jurisdiction to consider the contention on the present appeal, which is solely from the order appointing the receiver, under section 123 of the Practice Act. Under the portion of the provisions of that section relating to receivers, appeals may only be taken from an interlocutory order or decree "appointing a receiver, or giving other or further powers or property to a receiver already appointed."

Another contention of counsel is that the court erred in appointing the receiver, because Paulina S. Drielsma, one of the owners of the equity of redemption of the premises, was not notified of the making of the application for the receiver and did not have an opportunity to appear and object to the appointment. We find no merit in the contention. The record sufficiently discloses that

the receiver, which were answered by the Corporation, Columbia
Brown and Nicholas, and Nicholas the receiver. On January 14, 1933,
Brown and Nicholas filed their joint and several answer to complain-
ant's bill. On January 1933 they filed their written motion "to
rescind the order appointing the receiver and to remove him from
office." This motion was supported by their petition "in the nature
of a cross bill." On the same day there was a hearing on the motion,
resulting in the court entering an order denying it. There is con-
tained in the present transcript a certificate, signed by the judge,
of the proceedings on said hearing of January 18, 1933. It con-
tains of statements of counsel and testimony of witnesses taken from the court.
Apparently the court refused to hear testimony of witnesses, either
by defendant in support of their motion.
One of the confessions made by counsel for appellants
on this appeal is that the court acted in entering the order of
January 18, 1933, denying appellants' motion to rescind the order
of December 30, 1932, appointing the receiver, and to remove him
from office. We are without power or jurisdiction to consider the
question on the present appeal, which is solely from the order
rescinding the receiver, under section 123 of the Practice Act.
Under the provision of the provisions of this section relating to
receivers, appeals may only be taken from an interlocutory order
or decree "appointing a receiver, or giving effect to further powers
as regards a receiver already appointed."
Another contention of counsel is that the court acted in
appointing the receiver, because certain business parties, and of the
owners of the equity of redemption of the premises, was not notified
of the making of the application for the receiver and did not have
an opportunity to appear and object to the appointment. It is no
merely in the contention. The record sufficiently discloses that

many days before the appointment was made she had notice of complainant's application for a receiver.

Another contention of counsel is that the allegations of complainant's sworn bill, upon which the appointment of the receiver is based, do not sufficiently show the necessity for such appointment. We are of the contrary opinion and do not think, in view of the allegations of the bill and the provisions of the trust deed, that the court erred in making the appointment. (Haugan v. Carr, 263 Ill. App. 335, 340; Hagley v. Illinois Trust & Savings Bank, 199 Ill. 76, 79; Bolton v. Starr, 223 Ill. App. 39, 43.) The bill, in addition to alleging that certain accrued taxes on the premises are unpaid, that certain defaults have occurred in the payment of matured bonds and interest, and that the lands and improvements are "scant and insufficient security" for the indebtedness due, further alleges that the unpaid indebtedness amounts to about \$240,000, and that "the fair and reasonable market value of the land and the improvements thereon is \$222,000." And in the order appointing the receiver the court found that said last mentioned sum "is insufficient to discharge the obligations under the trust deed herein sought to be foreclosed."

The interlocutory order or decree of December 30, 1932, appointing John B. Kanaley as receiver of the premises, is affirmed.

ATTORNEYS.

Scanlan, P. J., and Sullivan, J., concur.

36238

EDWARD PURCELL,
Appellant,

v.

PATRICK J. KRELEY,
Appellee.

90 A
APPEAL FROM MUNICIPAL
COURT OF CHICAGO.

270 I.A. 629²

MR. JUSTICE SULLIVAN DELIVERED THE OPINION OF THE COURT.

This was a fourth class contract action in the Municipal court. There was a finding and judgment for defendant in a trial before the court without a jury. This appeal followed.

It appears that August 20, 1930, plaintiff and his wife, who resided in Ireland, executed a power of attorney which authorized defendant to sell or rent and otherwise manage property owned by plaintiff located at 8910-8912 South Loomis street, Chicago; that, commencing September, 1930, defendant collected the rents from the premises, deposited all of the rent collections in the Depositor's State Bank of Chicago in an account in his own name which was designated "special" upon advice of the officers of the bank, and in which was deposited only funds derived from this property, and that he made all disbursements necessary for repairs, maintenance and interest payments on this property from this account, as well as remittances of the net balances from time to time to plaintiff in Ireland; that he continued to administer plaintiff's property in this manner until about January 18, 1932, when the Depositor's State Bank in which this rent account was kept was closed by the Auditor of Public Accounts of the State of Illinois. Defendant admits there was a balance of \$383.33 in this account belonging to

plaintiff at the time the bank was closed and it was for that amount that this suit was brought.

The undisputed evidence shows that defendant made not more than four remittances from this rent account to plaintiff, who continued to reside in Ireland during all this period of over sixteen months (from September, 1930, to January, 1932), and it may be presumed that plaintiff acquiesced in the time, method and manner of the remittances as well as the collection, disbursement and accounting of the rents, as the evidence discloses no objection on his part.

Although defendant had been given a power of attorney to sell as well as manage this property the evidence discloses that the property was sold without his knowledge and without notice to him some time in December, 1931. There is some conflict as to just when a demand was made on defendant by plaintiff for the net balance of the rent in his possession.

The witness, John J. Kaveny, testified that following an incomplected telephone conversation with defendant January 14, 1932, he caused to be delivered to defendant the following letter of January 16, 1932:

"Dear Mr. Keeley:

Enclosed please find letter which we received from Mr. Edward Purcell, dated December 31, 1931, and addressed to you, notifying you that he has sold the property at 8910-12 South Loomis Street, and that the new owner has appointed us as his agent and for you to render an account of rents collected for the months of November, December and January, together with a check to cover the balance.

On Thursday, January 14th, the writer communicated with you by telephone to notify you that he had received said letter from Mr. Purcell, also a warranty deed from Mr. Purcell and his wife covering property at 8910-12 South Loomis Street, which deed has been recorded in the County Recorder's Office. The writer was very much surprised to learn that on the evening of January 14th you called on the tenants and informed them that you were the agent of the property and had not been dismissed. We also discover that you collected the balance due on January from one of the tenants by the name of Chirbank.

We will expect, according to the terms of Mr. Purcell's letter, that you account for rents in question and deliver the leases covering the above mentioned property within the next five days. If there are any items you would like to take up

plaintiff at the time the bank was closed and it was for him
amount this suit was brought.

The undisputed evidence shows that defendant made no
more than four remittances from this bank account to plaintiff,

who continued to reside in Ireland during all this period of
over sixteen months (from September, 1932, to January, 1933),
and it may be presumed that plaintiff resided in the time,

method and manner of the remittances as well as the collection,
disbursement and accounting of the funds, as the evidence discloses

no objection on his part.

Although defendant had been given a power of attorney

to sell as well as manage this property the evidence discloses

that the property was sold without his knowledge and without notice

to him some time in December, 1931. There is some conflict as to

just when a bargain was made on defendant's behalf for the net

balance of the rent in his possession.

The witness, John J. Kavanagh, testified that following on

undisputed telephone conversation with defendant January 14, 1932,

he seemed to be desirous to calculate the following figure as

January 14, 1932:

"Dear Mr. Kavanagh:

Enclosed please find letter with a receipt from

Mr. Robert (Smith), dated December 21, 1931, and addressed to

you, advising you that he has sold the property at \$2000.00.

Each January 1932, and that the new owner has appointed me

as his agent and for you to render no money or rents collected

for the month of November, December and January, together with

a check to cover the balance.

On Thursday, January 14, 1932, the writer communicated with

you by telephone to verify that he had received said letter

from Mr. Smith, and a receipt was given him. I shall see his

wife covering property on 0-11-12 North Avenue, which

had been recorded in the County Recorder's Office. The

writer was very much surprised to learn that on the evening of

January 14th you called on the writer and talked with him.

You were the agent of the property and had not been dispossessed.

It also appears that you collected the balance due on January

14th and at the same time by the name of Kavanagh.

You will expect, according to the terms of Mr. Smith's

letter, that you should pay him. In question and answer the

writer stated that above mentioned property which the bank

five copies. It is to be noted that you would like to have up

with the writer before making out your statement, would be glad to go over the situation with you.


Awaiting your early reply, and trusting this matter will be closed out at once, we are

Respectfully yours,

CHAS. V. McMILLAN CO.

per J. J. Kaveny."

He also testified that the messenger who delivered this letter also delivered a letter or a copy of a letter signed by plaintiff addressed to defendant and dated December 31, 1931. This letter was not offered in evidence but it developed that it had been written by the witness in Chicago and forwarded to plaintiff in Ireland to be signed by him and in turn mailed by plaintiff to defendant.

The only evidence in the record as to the receipt of a letter by defendant direct from plaintiff was the evidence of defendant himself that "about January 17th or 18th" or "about the time the bank closed" he received a letter from plaintiff advising him that he had sold the property and demanding payment of the balance due him on the rent account for November, December and January. Plaintiff strenuously urges that the defendant at one point in his testimony admitted that he received this letter from plaintiff about January 1, 1932. Defendant did so testify but it was plainly an inadvertence as defendant afterward corrected his testimony to the effect that the letter from plaintiff was not received by him until about the middle of January, and in any event even on plaintiff's own theory of the case it would have been a physical impossibility ^{defendant}  him to have received plaintiff's letter containing the demand of payment from Ireland as early as January 1, 1932, if it had been mailed from Ireland on the date it bore, December 31, 1931.

The plaintiff contends that where a collecting agent neglects to remit the proceeds of his collections during a period of several months and continues to withhold the money collected

with the writer before making any statement, would be
fine to go over the situation with you.
Waiting your early reply, and trusting this matter
will be closed out at once. We are,
Respectfully,
Yours,
J. J. [illegible]
Box 1, [illegible]

We also recalled that the messenger who delivered this letter
also delivered a letter or a copy of a letter signed by Plaintiff
addressed to defendant and dated December 31, 1933. This letter
was not offered in evidence but it developed that it had been
written by the witness in 1934 and was forwarded to Plaintiff in
January 1935 as signed by him and in turn mailed by Plaintiff to
defendant.

The only evidence in the record as to the receipt of a
letter by defendant direct from Plaintiff was the evidence of
Plaintiff himself that "about January 1935 or 1936" or "about the
time the bank closed" he received a letter from Plaintiff advising
him that he had sold the property and demanding payment of the
balance due him in the sum of \$100.00. Plaintiff testified that
January. Plaintiff obviously knew that the defendant at one
point in his testimony admitted that he received this letter from
Plaintiff about January 1, 1935. Defendant did so testify but
it was plainly an inadmissible as defendant's account contradicted
his testimony to the effect that the letter from Plaintiff was
not received by him until about the middle of January, and in his
testimony on Plaintiff's own theory of the case it would have
been a logical impossibility for him to have received Plaintiff's
letter concerning the demand of payment from defendant as early as
January 1, 1935, if it had been mailed from Plaintiff on the date
it says, January 31, 1934.

The Plaintiff contends that when a collecting agent
regards as valid the proceeds of his collection under a power
of attorney and continues to withhold the money collected

after his principal has caused a formal demand to be made upon him, and that while he so withheld the funds the bank in which the agent had deposited the money had been closed by the state auditor, the question of the agent's negligence is a material consideration in determining the question as to the agent's liability for the loss of the funds. This is a correct statement of the law if the premises are correct. However, in the instant case there is no basis for assuming that defendant was negligent in failing to remit for three months when it is a fair inference from the evidence that the remittances were to be made only every three or four months, as the plaintiff had apparently acquiesced in the conduct of defendant in forwarding but four remittances in sixteen months. There is no evidence in this record of a positive, definite demand on defendant for the payment of this rent balance except the evidence of defendant himself that he received plaintiff's letter containing the demand "around the 17th or 18th of January" or "about the time the bank closed", and that he was not sure whether it was before or after the bank closed.

Plaintiff's witness John J. Kaveny's telephone call of January 16, and his letter of January 16, might have sufficed to advise defendant that the property had been sold, but they could hardly be construed as legal demands on the part of plaintiff for the payment of this money. The relation of plaintiff and defendant was that of principal and agent and the sole question presented by this record is whether, in caring for the property of plaintiff or in accounting for the collection of rents by defendant, the agent exercised that degree of care and caution for its safety that an ordinarily prudent person would have exercised under like and similar circumstances. There is nothing in this record that shows that defendant was remiss in any of his duties to his absent principal. On the contrary the evidence shows that he was faithful

After his principal has caused a formal demand to be made upon him, and that while he is withheld the funds the bank in which the agent has deposited the money has been closed by the state auditor, the question of the agent's responsibility in a material consideration in determining the question as to the agent's liability for the loss of the funds. This is a serious statement of the law in the present case. However, in the instant case there is no basis for assuming that defendant was negligent in failing to make any such demand when it is a fact that the evidence shows that the remittances were so made only every three or four months as the plaintiff had apparently agreed in the contract of banking and in forwarding her loan remittances in fifteen months. There is no evidence in this record of a positive definite demand as to the payment of this and balance except the evidence of defendant's statement that he received plaintiff's letter containing the demand "received the 17th of January" or "about the time the bank closed", and that he was not sure whether it was before or after the bank closed.

Plaintiff's witness John A. Harvey's telephone call of January 14, and his letter of January 16, might have entitled to be taken into account in the jury's deliberations, but they could hardly be considered as being relevant to the fact of plaintiff's payment of this money. The refusal of plaintiff and defendant to give of plaintiff and agent and the wife's position presented by this record is evident, in order for the purpose of plaintiff's it is mentioned for the collection of this \$5,000 amount, the agent mentioned that degree of care and attention for the safety that in plaintiff's position would have required under this and similar circumstances. There is nothing in this record that shows that defendant was negligent in his failure to give plaintiff, in the contrary the evidence shows that he was negligent.

to the trust reposed in him; that during the sixteen months he was in charge of this property he was diligent in administering it and that no legal demand was made on him by plaintiff for the payment of this balance until the day or the day before the bank closed, and that by reason of the closing of the bank January 13, 1932, he was not afforded a reasonable opportunity in the exercise of ordinary care and caution, after demand was made, to make the necessary accounting and payment to the plaintiff of the net balance on deposit in the bank.

In the case of American Express Co. v. Stuart, 134 Ill. App. 390, 393, where a druggist had been acting as agent for the express company in the sale of express money orders and the proceeds of such sales had disappeared from the safe of the agent, we believe the court laid down the correct rule when it said:

"The relation of appellant and appellee was merely that of principal and agent, and in caring for the property of the appellant, his principal, appellee was only bound to exercise that degree of care and caution for its preservation and safety that an ordinarily careful and prudent person would have exercised under like or similar circumstances."

The question of due care on the part of the defendant was one of fact for the determination of the trial court and it is well settled that courts of review are not at liberty to disturb the finding of the trial court unless the same is manifestly contrary to and unwarranted by the evidence.

For the reasons stated we are of the opinion that the Municipal court was justified in its finding and its judgment is affirmed.

AFFIRMED.

Scanlan, P. J., and Gridley, J., concur.

to the time referred to in the above mentioned
 was in charge of this property he was diligent in maintaining
 it and that no legal demand was made on him by plaintiff for the
 payment of this balance until the day on the day before the bank
 closed, and that by reason of the closing of the bank January
 12, 1904, he was not afforded a reasonable opportunity to the
 exercise of ordinary care and caution, after demand was made, to
 make the necessary arrangements and payment to the plaintiff of the
 not balance on deposit in the bank.

In the case of Western Union Tel. Co. v. Smith, 100 Ill.
 400, 1904, this court has decided in favor of the
 Western Union company in the sale of Western Union money orders and the pro-
 ceeds of such sales had been deposited from the sale of the money or
 before the bank failed down the money order when it failed.

"The relation of appellant and appellee was merely
 that of principal and agent, and in virtue of the agency of
 the appellee, the principal, appellee was not bound to exercise
 any degree of care and caution in the exercise of his agency and solely
 that an ordinary prudent and business person would have exercised
 before the failure of the bank."

The question of how far the duty of the defendant was
 one of this for the determination of the trial court and it is well
 settled that courts of review are not of liberty to disturb the find-
 ing of the trial court unless the same is manifestly contrary to
 and sustained by the evidence.

For the reasons stated we are of the opinion that the
 judgment of the trial court was justified in its finding and its judgment is

affirmed.

RECORDED.

Witness my hand and seal, this 1st day of January, 1904.

36273

GUSTAF ALEXANDER, doing business
as ALEXANDER PARLOR FRAME CO.,
(Unincorporated),

Appellee,

v.

INTERNATIONAL FURNITURE CO., Inc.,
a corporation,

Appellant.

APPEAL FROM MUNICIPAL
COURT OF CHICAGO.

270 I.A. 629³

MR. JUSTICE SULLIVAN DELIVERED THE OPINION OF THE COURT.

April 7, 1932, this action was brought in the Municipal court by Gustaf Alexander, doing business as Alexander Parlor Frame Co., against the International Furniture Co., Inc., a corporation, to recover \$1616.19 for goods, wares and merchandise furnished, sold and delivered to defendant by plaintiff.

Facts sufficient to prove plaintiff's case were either presented in evidence or admitted and defendant offered no evidence disputing or denying plaintiff's claim. The court directed a verdict in favor of plaintiff for \$1616.19 and entered judgment on the verdict for that amount. This appeal followed.

It appears that December 13, 1929, an identical suit was started in the Municipal court, except that it was brought in the name of Alexander Parlor Frame Co., Inc., a corporation, under a misapprehension that the business of plaintiff had been incorporated and was being conducted as a corporation; that this original case was pending in the Municipal court until April 8, 1932, when it was reached for trial, at which time plaintiff's attorney discovered that plaintiff had not been incorporated and was not conducting its business as a corporation; and that by reason of this discovery plaintiff took a nonsuit.

Subsequent to the commencement of the instant suit

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
(Southern District)

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

270 I.A. 639

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
(Southern District)

THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

That in and to the said Court was presented in the Southern District of New York, being a complaint in equity, filed by the Plaintiff, JAMES H. HARRIS, against the Defendant, JAMES H. HARRIS, a corporation, in which the Plaintiff claims that the Defendant is indebted to him in the sum of \$100.00, and that the Defendant has refused to pay the same.

That the Plaintiff claims that the Defendant is indebted to him in the sum of \$100.00, and that the Defendant has refused to pay the same. The Plaintiff claims that the Defendant is a corporation, and that the Defendant is indebted to him in the sum of \$100.00, and that the Defendant has refused to pay the same.

It appears that between the Plaintiff and the Defendant, there was a contract in writing, dated the 1st day of January, 1900, in which the Defendant agreed to pay to the Plaintiff the sum of \$100.00, and that the Defendant has refused to pay the same. The Plaintiff claims that the Defendant is a corporation, and that the Defendant is indebted to him in the sum of \$100.00, and that the Defendant has refused to pay the same.

April 7, 1932, defendant filed its affidavit of merits May 20, 1932, and the case was at issue. May 26, 1932, plaintiff served notice on defendant that he would appear May 27, 1932, before the Chief Justice of the Municipal court and move that the case be advanced for trial or set for immediate hearing. June 9, 1932, plaintiff was given leave to file his notice instanter and an affidavit in support of his motion to advance the case and defendant was permitted to file instanter written objections to the motion and affidavit of plaintiff. Thereupon the Chief Justice of the Municipal court sustained the motion of plaintiff and set the case for trial June 20, 1932. Defendant excepted to the ruling of the court on plaintiff's motion and leave was granted to defendant to file its interlocutory bill of exceptions, which it did, and the same was approved July 7, 1932. June 20, 1932, when the case was reached and called for trial, the attorneys for defendant refused to participate in the trial, offered no testimony in defense of the claim and objected to the jurisdiction of the court on the grounds that the case had been advanced and was being tried contrary to the rules of the Municipal court of Chicago. It is urged that the failure of the trial court to conform to a certain rule of the court deprived it of jurisdiction to try the case on its merits.

Counsel does not contend, however, that the Municipal court lacked jurisdiction of the persons and the subject matter of this proceeding, and if the court did err in its ruling on the motion to advance the case it was a mere error of discretion and could not possibly affect its jurisdiction to try the case. In Carroll, Schendorf & Boenicke, Inc. v. Hastings, 259 Ill. App. 564, 572, this court said:

"Jurisdiction is the power to hear and determine the matter in controversy between parties, and if the law gives the court power to render a judgment or decree the court has jurisdiction, and an erroneous decision cannot deprive it of that jurisdiction."

The affidavit of plaintiff filed in support of his motion

April 7, 1932, submitted the affidavits of which are in
and the same was at issue. Top of 1932, Plaintiff moved
we believed that he was under the law, before the court
the law of the United States and that the law be enforced
right to not the Plaintiff's property. Top of 1932, Plaintiff was
given leave to file his motion for judgment and an affidavit in support
of his motion to remove the case and Plaintiff was permitted to file
instantly raised objections to the motion and affidavit of Plaintiff.
Throughout the trial course of the Plaintiff's case, Plaintiff the motion
to Plaintiff and not the case for trial June 30, 1932. Defendant
objected to the ruling of the court on Plaintiff's motion and leave
was granted to Defendant to file the instantaneously bill of exceptions
which is in, and the same was approved July 7, 1932. Top of 1932,
when the case was reached and called for trial, the attorney for
Plaintiff refused to participate in the trial, offered no testimony
in support of his claim and object to the jurisdiction of the court
on the grounds that the case had been advanced and was being tried
according to the rules of the Plaintiff's court of Chicago. It is noted
that the failure of the Plaintiff to remove to a certain rule of
the court's failure to try the case on its merits.
Defendant does not contend, however, that the Plaintiff
never failed jurisdiction of the court and the subject matter of
this proceeding, and it was not his duty to the ruling on the
motion to remove the case. It was a mere error of procedure and
could not possibly affect the jurisdiction to try the case. In
Counsel, Plaintiff & Defendant, Inc. v. Plaintiff, May 11, 1932.
BY, this court said:
"Jurisdiction is the power to hear and determine the matter
in controversy between parties, and it is the law gives the court power
to render a judgment in favor of the party who has jurisdiction, and on
otherwise rendered would be negative of the jurisdiction."
The affidavits of Plaintiff filed in support of his motion

for the advancement of the case for trial was as follows:

"Gustaf Alexander, doing business as Alexander Parlor Frame Co., plaintiff in the above entitled cause, being first duly sworn, on oath deposes and says that the indebtedness in the above case has been due and owing the plaintiff since 1929, and that said suit was brought upon the same more than a year ago, and that said defendant has been so evasive, crafty and deceptive in said matter that it escaped making all payments in and out of court, and that owing to said delay, the plaintiff in said matter will be unable to secure his witnesses; that one of his witnesses is now leaving the city to return to his people and seek employment and a livelihood elsewhere than in the City of Chicago and County of Cook; that by said witness he expects to prove that said material was sold and delivered and sent out in the amount stated in the bill of particulars, etc., and that the material was in first class condition, was number one lumber, and that all of said goods, wares and merchandise were made and manufactured in a high class workmanlike manner, were perfect in all respects when made, when sold, and when delivered, that the defendant at no time made any payment on the same or complained, but used and utilized all of said goods, wares and merchandise in its business; and without said witness this plaintiff will be unable to prove his case."

Defendant contends that the affidavit of plaintiff was insufficient and afforded the court no legal grounds for advancing the cause for trial and that the order of the court setting it for trial June 20, 1932, and removing it from its regular place on the calendar was contrary to the rules of the Municipal court. In support of this contention defendant calls our attention to the rule embodied in general order of the Municipal court of Chicago No. 314, which is as follows:

"(A) There is hereby established an 'Emergency Calendar.' Upon any party, his agent or attorney, in any suit upon a note or other instrument in writing for the payment of money only, or upon an open account, which has been placed upon the regular jury calendar, presenting to the judge or judges assigned to hear such 'Emergency Calendar' an affidavit that he verily believes the trial of said suit will not occupy more than one and one-half hours' time (excluding the time to be consumed in the selection of a jury) and stating the grounds for such belief, and it being made to appear that there is a reasonable probability that such suit can be tried in the aforesaid time, such suit shall be placed on said 'Emergency Calendar' and shall lose its place on the regular jury calendar. Notice of such motion shall be given opposing counsel.

"(B) A suit upon said 'Emergency Calendar' shall only be passed or continued for good cause shown but by agreement may be stricken therefrom and resume its regular place on the jury calendar.

"(C) If the trial of any suit which is upon the said 'Emergency Calendar' shall occupy more than one and one-half hours' time, then the court shall stop the trial, take the case from the jury and continue it, and the suit shall, unless otherwise ordered by the court, go to the foot of the pending jury calendar without

further notice, and shall not again be placed upon the same 'Emergency Calendar' and all costs incurred to that time shall be taxed against the party so placing the suit upon the 'Emergency Calendar'."

Defendant insists that this rule is the only rule of the Municipal court bearing upon the advancement of cases and cites many decisions of the Illinois Supreme and Appellate courts to the effect that rules of court are obligatory on the court itself, as well as upon the parties, and must be administered according to their terms while they remain in force, and that rules of court when entered of record become the law of procedure in matters to which they relate when not inconsistent with the statute, and are binding on the court. This is the recognized law, but neither the law nor the rule relied upon by the defendant is applicable to the issue presented in this case.

The rule quoted simply provides a method for placing cases on the short cause calendar of the Municipal court and as far as we are able to discover was not even contemplated by plaintiff as affording a legal basis for his motion, and the affidavit in support thereof, for the advancement of the case. Neither his motion nor his affidavit made any reference to the "Emergency Calendar" as provided for in this rule nor to the time it would take to try the case. By his motion he sought the advancement of the case on the regular calendar for the reasons set forth in the affidavit. The above rule of the Municipal court relied on by defendant and several sections of the Municipal Court Act, ch. 37, Cahill's Ill. Rev. St., referred to in plaintiff's brief have no relevancy to the question presented for decision by this appeal.

Courts have inherent power to advance cases for trial for good cause shown and in this state the power and authority to advance cases is specifically granted under sec. 31, ch. 110, Cahill's Ill. Rev. St., which provides:

"All causes shall be tried, or otherwise disposed of, in the order they are placed on the docket, unless the court, for good and sufficient cause, otherwise directs * * *."

Under this statute it is the settled law of this state that a case may be advanced for trial for sufficient cause in the sound discretion of the trial court. The opinion of our Supreme Court in the case of Spitzer v. Schlatt, 249 Ill. 416, 419-20, is particularly applicable to the case at bar because of the similarity of the facts. In that case the court held:

"Appellants' contention is, that after the new trial under the statute was granted, the case stood as though it was a new case commenced on that day, and was not, therefore, subject to call until all of the cases then pending had been called for trial. Appellants' attorney filed an affidavit in support of the objection to the order setting the cause for trial on May 16 which is embodied in the bill of exceptions taken at that time. The rules of court are also in the bill of exceptions regulating the order in which cases are to be docketed and tried in the circuit court of Cook county. The affidavit filed in support of appellants' objection shows the number of cases that were then pending for trial on Judge Scanlan's calendar which were subject to call in regular order before the case at bar would be reached. From the affidavit it appears that there were about seven hundred and fifty cases then pending for hearing on Judge Scanlan's calendar. There is nothing in the affidavit showing that appellants were not as well prepared to try the case at the time it was set down for hearing as they would have been at any later date, and the only reason assigned in appellants' brief for delaying the trial of the case is, that they might have obtained a compromise if the case had been placed at the foot of the calendar and not tried until it was reached in regular order. The statute provides that 'all causes shall be tried, or otherwise disposed of, in the order they are placed on the docket, unless the court, for good and sufficient cause, shall otherwise direct.' (Hurd's Stat. 1909, chap. 110, sec. 21.) What is 'good and sufficient cause' is not defined by the statute and must therefore be determined by the trial court, in the first instance, in the exercise of a sound legal discretion. (Morrison v. Redenborg, 138 Ill. 22; Stanton Coal Co. v. Monk, 157 Id. 369; Richardson Fueling Co. v. Seymour, 235 Id. 319.) In Stanton Coal Co. v. Monk, *supra*, on page 373, it was said: 'The statute does not determine what shall constitute sufficient cause for trying a case out of its order on the docket, but that is a matter to be determined by the court in the exercise of a sound legal discretion. When the court so exercises its discretion in the matter, its action will not be interfered with by a reviewing court unless there has been a clear abuse of its discretion,' citing cases. * * * Appellants had had ample time to prepare and present any meritorious defense they had. * * * The trial court had the power, under the statute, to try the case out of its regular order for good and sufficient cause. The record does not show specifically what the court regarded as sufficient cause for trying the case out of its regular order, but the bill of exceptions contains a statement by the court in reference to the length of time that the case had been pending, and the court was probably influenced by that fact in setting the case down for a speedy trial. But it is not necessary that the

records should show the reasons upon which the trial judge exercised his discretion. In the absence of a showing to the contrary, the presumption will be indulged that the court properly exercised its discretion. (Smith v. Third Nat. Bank of St. Louis, 79 Ill. 118.) There was no error committed in trying this cause out of its regular order."

There was not even a suggestion of a defense against this claim on the trial, and inasmuch as the matters set forth in the affidavit for the advancement of the case were not controverted, and inasmuch as the original case involving the same subject matter and the same parties was pending in the Municipal court since December 13, 1929, it is our opinion that there was no abuse of discretion by the Chief Justice of the Municipal court when the motion to advance the case for trial was sustained.

For the reasons stated herein the judgment of the Municipal court is affirmed.

AFFIRMED.

Scanlan, P. J., and Gridley, J., concur.

36282

ORVILLE C. HATCH, Jr.,
Appellee,

v.

E. and A. OPLER, Inc.,
a corporation,
Appellant.

APPEAL FROM CIRCUIT
COURT, COOK COUNTY.

270 I.A. 629⁴

MR. JUSTICE SULLIVAN DELIVERED THE OPINION OF THE COURT.

This appeal involves a suit brought in the Circuit court of Cook county on a foreign judgment. The original proceedings were instituted in the Superior court of the county of King, in the state of Washington, a court of general jurisdiction. Judgment was entered in that court against the defendant, E. and A. Opler, Inc., an Illinois corporation, for \$913.64, together with interest thereon at the rate of six per cent per annum from February 9, 1928, and plaintiff's costs aggregating \$23.70. The plaintiff in that proceeding filed a suit based on that judgment in the Circuit court of Cook county and in connection therewith filed a copy of the judgment sued upon. The court after trial without a jury entered a finding and judgment against the defendant for \$1123.43.

The defendant contends that the trial court erred in permitting the introduction in evidence by the plaintiff of an exemplified copy of the judgment order of the Washington court, on the ground that it failed to include on its face facts showing that the foreign court had jurisdiction of the person of the Illinois corporation, defendant; and in refusing to permit the defendant to introduce evidence which it claimed would show that the foreign court was not authorized by law to exercise

A 2

STATE OF ILLINOIS
COUNTY OF COOK

270 I.A. 629

IN SENATE
JANUARY 11, 1922
REPORT OF THE
COMMISSIONER OF THE
LAND OFFICE

This appeal involves a suit brought in the Circuit Court of Cook County on a foreign judgment. The original proceedings were instituted in the superior court of the county of King, in the state of Washington, a court of general jurisdiction. Judgment was entered in that court against the defendant, H. and A. Ogden, Inc., an Illinois corporation, for \$113,000.00, together with interest thereon at the rate of six per cent per annum from January 9, 1920, and plaintiff's costs amounting \$25.00. The plaintiff in that proceeding filed a suit based on that judgment in the Circuit Court of Cook County and in connection therewith filed a copy of the judgment and judgment against the defendant for \$113,000.00. The court after trial without a jury entered a verdict and judgment against the defendant for \$113,000.00. The defendant contends that the trial court erred in permitting the introduction in evidence by the plaintiff of an authentic copy of the judgment given by the Washington court, on the ground that it failed to include on its face facts showing that the foreign court had jurisdiction of the person at the Illinois corporation, defendant, and in refusing to permit the defendant to introduce evidence which it claimed would show that the foreign court was not authorized by law to exercise

jurisdiction over the defendant.

The judgment order of the Washington court contained the following recitals:

"Be it Remembered that this cause came on duly and regularly for trial in open court on the 13th day of June, 1930, before the undersigned Judge of the above entitled court, upon the complaint of the plaintiff, the answer of the defendant and the reply of the plaintiff thereto; plaintiff appearing by his attorneys Murphy & Ruma, the defendant appearing by its attorneys Battle, Mulbert & McNeill and Weldon C. Bettens, and the defendant in open court objected to the jurisdiction of the court and it appearing to the satisfaction of the court that the said defendant was duly and regularly served with summons herein and the court has jurisdiction of the parties hereto and the subject matter of this action, and the matter of jurisdiction having been previously determined adversely to the contention of said defendant and the challenge to the jurisdiction of the court overruled; evidence was then taken and the cause submitted to the court for its consideration and determination, and the court having fully considered the proofs offered and becoming fully advised in the premises and having made its findings of fact and conclusions of law, reduced the same to writing and caused them to be signed and filed herein."

It appeared that summons was personally served on Edmund Opler, as president of the defendant corporation, in King county, Washington, as well as upon the A. S. Pinkham & Company, which company it was alleged was an agent of the defendant; that attorneys were authorized to appear specially for the defendant and challenge the jurisdiction of the court; that a hearing was had as to the jurisdiction of the court over the person of the defendant; that the question of jurisdiction was decided adversely to the defendant; that thereafter the defendant filed an answer and the cause proceeded to a hearing on the merits in which the defendant through its attorneys participated. If the general appearance of the defendant was filed in the Washington court by its attorneys there, without authority to do so, the defendant may hold them responsible in the proper action.

An examination of the bill of exceptions here discloses that practically the entire proceedings before the trial court consisted of colloquy between counsel and argument to the court

concerning the admissibility of the exemplified copy of the foreign judgment order and the exemplified copy of the transcript of the record of the trial in the Washington court. The trial court admitted both in evidence. The only other evidence produced on the trial was the evidence of the plaintiff as to damages. There was an offer of evidence by the defendant which was refused by the court.

The defendant has failed to include in its bill of exceptions the exemplified copy of the transcript of the record of the trial of this cause in the Superior court of King county, Washington, wherein the original judgment was entered. We are thus precluded from examining the only evidence in the record which would throw light on the points in controversy and which was beyond question the determining factor in the ultimate finding of the trial court, as well as in its ruling on the offer of evidence made in behalf of the defendant.

If the defendant had presented to this court the complete bill of exceptions we would have been enabled, as the trial court was, to examine fully into the record of the Washington court. It appears from the pleadings, the argument before the court and colloquy of counsel, that the missing copy of the transcript of the record of that court contained the complaint of the plaintiff there, the summons, the return of service thereon, the special appearance of defendant, the defendant's motion to quash the summons, affidavits in support thereof, setting forth that the defendant was not and had not been engaged in business in the State of Washington, and challenging the jurisdiction of that court over the person of the defendant, its motion to have the question as to whether the defendant was engaged in business in Washington heard on oral testimony, the ruling of that court denying the motion

concerning the authenticity of the exemplified copy of the
foreign judgment and the exemplified copy of the transcript
of the record of the trial in the Washington court. The trial
court admitted both in evidence. The only other evidence produced
on the trial was the evidence of the plaintiff as to damages. There
was an offer of evidence by the defendant which was refused by the
court.

The defendant has failed to include in its bill of
particulars the exemplified copy of the transcript of the record
of the trial at this court in the previous court of this country.
Washington, wherein the original judgment was entered. It is
then provided that examining the said evidence in the record
which would show facts on the merits in controversy and which
are beyond question the defendant's failure to include the
copy of the trial court, as well as in the ruling on the offer of
evidence made in behalf of the defendant.

If the defendant had presented to this court the
exemplified bill of particulars it would have been admitted, as the
trial court was, to examine fully into the record of the Washington
court. It appears from the pleadings, the arguments before the
court and custody of counsel, that the missing copy of the
transcript of the record of that court contained the complaint of
the plaintiff there, the answer, the return of service thereon,
the special appearance of defendant, the defendant's motion to
quash the return, affidavits in support thereof, setting forth
that the defendant was not and had not been engaged in business in
the State of Washington, and challenging the jurisdiction of that
court over the person of the defendant. The motion to have the question
as to whether the defendant was engaged in business in Washington
put on and answered. The ruling at that point leaving the motion

to quash the summons and sustaining the motion to quash or strike the defendant's affidavit alleging want of jurisdiction, the answer of the defendant, the motion of defendant supported by affidavit that a third party be made a necessary party to the action and the denial of this motion by the court, counter-claim of the defendant for judgment against the plaintiff, the offering in evidence or filing of ^a/certain contract by the defendant and various motions for a continuance of the hearing on the merits on behalf of the defendant.

Without this record before us we are in no position to hold otherwise than that the trial court was correct in sustaining the objection to the testimony offered by the defendant in support of its contention that the Washington court was without jurisdiction of its person.

The judgment of the trial court is presumed to be correct until the contrary is shown, and by reason of the failure of the defendant to include the exemplified copy of the transcript of the record of the Washington court in its bill of exceptions, we are compelled to conclude that the omitted evidence justified the action of the trial court.

If the above reasons are not sufficient for the affirmance of this judgment, still there is no merit in defendant's contention that either a corporation or an individual can be a party to a full and fair hearing in a court of a foreign state on the question of the jurisdiction of that court over the person of the defendant, and then in an action on the foreign judgment in this state raise the same question again here.

The case of Frick-Reid Supply Co. v. Consolidated Adjustment Co., 197 Ill. App. 303, on which the defendant placed its main reliance in the trial court and which it cites here is easily distinguishable from the case at bar. In that case the judgment was rendered in the District court of Washington county, Oklahoma,

against an Illinois corporation without any personal service of summons, without the appearance of an attorney in its behalf and without affording the defendant an opportunity for its day in court.

On the question of whether or not the judgment of a foreign state is res adjudicata upon jurisdictional questions raised and adjudicated there, it was held by this court in Cherry v. Chicago Life Ins. Co., 190 Ill. App. 70, 73:

"The substantial question presented has to do with the jurisdiction of defendants by the Tennessee courts. This issue was raised by appropriate pleadings in the case in the Circuit Court of Chester county, and there it was adjudged that the court had jurisdiction of the defendants. * * * There can be no doubt that the question of jurisdiction was adjudicated in the Tennessee courts, on a writ of error sued out by themselves.

"The claim of defendants is that regardless of this adjudication they may raise the same question whenever and wherever in any other State than Tennessee suit is brought on this judgment. After an examination of the cases cited in support of this claim, we have found none directly in point. The decisions cited by defendants have to do with cases where the court entering judgment assumed jurisdiction but did not expressly consider or pass upon the question of its jurisdiction, or where there is a mere recital in the judgment rendered by the court of another State that it did have jurisdiction, and it was held in Forsyth v. Barnes, 228 Ill. 326, that this mere recital would not prevent the courts of another State from inquiring into the question of jurisdiction. Other of the decisions discuss the question whether a court of appellate jurisdiction is precluded from inquiring into the question of jurisdiction of the lower court by the fact that defendant may have filed a special appearance to contest the point of jurisdiction, and when defendant's contention was overruled filed an answer to the merits of the case. Such a case is Harkness v. Hyde, 98 U. S. 476. The case before us manifestly does not fall within any of these classes, for we have here a case where the issue of the jurisdiction of the parties was raised and adjudicated after full hearing, - all of which appears from the proceedings in this case and not merely as a matter of recital."

In the Cherry case the court quoted 2 Black on Judgments, sec. 901:

"Before leaving this point it is necessary to remark that there is good authority for the proposition that if it appears affirmatively from the record of the judgment, and as a matter of adjudication, that the defendant had legal notice of the suit or duly authorized an appearance to be entered for him, then he is no longer at liberty to allege a want of jurisdiction. The reason of this is obvious. In such a case, the question of jurisdiction would be one of the grounds of defense to the original action, there set up and adjudicated, and of course equally concluded with any other defense. And hence the principle which forbids a re-examination of the merits of the controversy would apply."

The defendant cites several cases in support of its contention that the trial court erred in not permitting it to put in evidence showing lack of jurisdiction of the Washington court over the person of the defendant, and that it also erred in permitting the introduction in evidence over its objection of the judgment order of the Washington court on the ground that it did not on its face show jurisdictional facts. A careful analysis of these cases leads us to the conclusion that in none of the cases cited do the facts square with the facts in the case at bar. No case cited disclosed personal service of summons, appearance of defendant and appearance of attorneys in behalf of the defendant, hearing and adjudication on the question of jurisdiction and participation in the hearing on the merits of the case in the court of the foreign state.

In Chicago Title & Trust Co. v. Nat. Storage Co., 260 Ill. 435, 493-4, the Court, in discussing the adjudication of a jurisdictional question by another court, said:

"An estoppel by verdict is but another branch of the doctrine of res judicata, and it rests upon the same principle of law, - that is, that a matter once litigated between parties to a final judgment in a court of competent jurisdiction cannot again be controverted. When this doctrine is applied to a single question or point arising in the course of litigation which has finally been adjudicated it is designated as an estoppel by verdict, and the same question or point cannot again be litigated between the same parties in the same or any other court at law or in chancery, and neither party, nor their privies, will be permitted to allege anything inconsistent with the finding upon that question.
* * *

"The doctrine of estoppel by verdict applies to questions arising upon an issue as to the jurisdiction of the court as fully and completely as to questions arising upon the trial of a cause upon its merits, and is not affected by the circumstance that the court may ultimately determine that it can go no farther."

We are of the opinion that the court below properly held that the judgment of the Washington court is res adjudicata upon the jurisdictional questions which were directly raised and adjudicated there.

Finding no error in the judgment of the Circuit court it is affirmed.

AFFIRMED.

Scanlan, P. J., and Gridley, J., concur.

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marked differences in human capital at each time, particularly in the number of years

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It is hereby certified that the foregoing is a true and correct copy of the original as the same appears in the records of the Department of the Interior.

we must not let the situation become more complicated. The situation will be

Law number of the year in the month of the Russian calendar

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1. The first step is to identify the problem or question that needs to be answered. This involves understanding the context and the specific requirements of the task.

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36301

NOYES F. WATERMAN,
(complainant below),

v.

GEORGE E. HALL,
(defendant below.)

ROOSEVELT ROAD & ST. LOUIS
BUILDING CORP., a corporation,
Appellant,

v.

BEN M. SMITH and FREDERICK
L. FAKE,
Appellees.

APPEAL FROM

CIRCUIT COURT,

COOK COUNTY.

270 I.A. 630¹

MR. JUSTICE SULLIVAN DELIVERED THE OPINION OF THE COURT.

In the consolidated case of Noyes F. Waterman v. George E. Hall et al., in which Ben M. Smith and Frederick L. Fake filed an intervening petition, and in which Barney Krom, Arthur Krom and Sadie Krom filed a supplemental bill, a motion was made by the Roosevelt Road & St. Louis Avenue Building Corporation that it be made a party complainant to the supplemental bill, which motion was denied by the Circuit court. This appeal followed.

It appears that after an extended hearing of the above entitled cause the trial court orally announced its finding May 16, 1932, but that no decree was entered until June 18, 1932; that the appellant, after the court had orally announced its decision, gave notice that it would appear on June 1, 1932, and ask leave to become a party complainant; that it did appear on that date and offered, in support of its application to become a party to the proceedings, a deed dated May 18, 1932, from the

1932

JOHN F. GARDNER
(employment below)

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(employment below)

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(employment below)

250 I.A. 630

Kroms to the Roosevelt Road & St. Louis Avenue Building Corporation, conveying the property which was the subject matter of the supplemental bill of the Kroms and a certificate of incorporation in proper form under date of May 20, 1932. It also appeared that Barney Krom, Arthur Krom and Sadie Krom, complainants in the supplemental bill and grantors in the deed, were also the owners of all the stock of the appellant corporation and the officers and directors of same.

The appellant contends that its application to become a party to this litigation should have been allowed on its showing that it had acquired an interest in the subject matter of the litigation, and that since that interest was acquired subsequent to the oral finding of the court and prior to the entry of the decree, its motion was made in apt time.

The record does not disclose the reason for the Kroms incorporating as the Roosevelt Road & St. Louis Avenue Building Corporation, nor the reason for the conveyance of the title and interest of the Kroms individually in this property to the Kroms incorporated after the court had announced its finding. Any interest that the corporation acquired in this property was represented by the grantors, the Kroms, in their appeal from the decree of the Circuit court. (See our opinion in the appealed case Gen. No. 36300, this day filed.)

It was entirely unnecessary that the Kroms, organized as a corporation, be permitted to become a party to the proceeding for the purpose of appealing when the Kroms individually were already parties and did appeal from the decree and represented the identical interest in the real estate.

For the reasons stated it is our opinion that the court did not err in denying the motion of the appellant and the order of the Circuit court is therefore affirmed.

APPROVED.

Scanlan, P. J., and Gridley, J., concur.

known to the necessary head & 32. Louis Avenue Building Corporation.
conveying the property which was the subject matter of the applica-
mental bill of the known and a certificate of incorporation in proper
form under date of May 10, 1922. It also appeared that Henry Krum,
Arthur Krum and Louis Krum, complainants in the supplemental bill
and parties to the deed, were also the owners of all the stock of
the applicant corporation and the officers and directors of same.
The applicant contends that the application to become
a party to this litigation would have been allowed on the showing
that it had acquired an interest in the subject matter of the
litigation, and that since that interest was acquired subsequent to
the final finding of the court and prior to the entry of the decree,
the motion was made in apt time.
The court does not discuss the reason for the known
incorporation as the necessary head & 32. Louis Avenue Building
Corporation, nor the reason for the conveyance of the title and
interest of the known individually in this property to the known
incorporation after the court had announced its finding. It
states that the corporation acquired in this property was
represented by the known, the known, in their appeal from the
decree at the circuit court. (See our opinion in the original
case No. 10, 2022, this day filed.)
It was entirely unnecessary that the known, complainants
as a corporation, be permitted to become a party to the proceeding
for the purpose of attacking when the known individually were
already parties and did appeal from the decree and represented
the identical interest in the real estate.
The court stated in its opinion that the known
did not try to bring the motion at the applicant and the order
of the circuit court is therefore affirmed.
AFFIRMED.
Dated at St. Louis, Mo., this 14th day of June, 1922.

36347

ALBERT GARTNER and
LIZZIE GARTNER,

Appellees,

v.

ALBERT W. SEIDEL and
GUY L. WAGONER,

Appellants.

94 A
APPEAL FROM MUNICIPAL
COURT OF CHICAGO.

270 I.A. 630²

MR. JUSTICE SULLIVAN DELIVERED THE OPINION OF THE COURT.

Action was brought in the Municipal court by plaintiffs Albert Gartner and Lizzie Gartner, against Albert W. Seidel, Guy L. Wagoner and P. A. Clarey, to recover \$1100 alleged to have been paid by plaintiffs for stock in the Diversey Parkway Hospital, Inc., a corporation (hereinafter referred to as the Diversey Parkway Hospital.) Defendant Clarey was never served with summons and did not appear, and on motion of plaintiffs suit was dismissed as to him. The case was tried by the court, without a jury, and judgment was rendered in favor of plaintiffs for \$1400, including an allowance of \$300 attorney's fees, from which defendants appealed.

The case proceeded to trial on plaintiffs' amended statement of claim which alleged that May 26, 1930, Albert W. Seidel and Guy L. Wagoner, who were respectively president and secretary and also directors of Diversey Parkway Hospital, a corporation organized under the laws of the State of Illinois, sold through Clarey, their agent, to the plaintiffs Class "D" securities, without complying with the provisions of the Illinois Securities Act, which securities consisted of four certificates of stock in the Diversey Parkway Hospital, two of them each being for five shares of preferred stock of the alleged value of \$100 a share and the other two each being for ten shares of common stock of the alleged par value of \$5 a

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share; that May 26, 1930, the defendants as president and secretary of the aforesaid corporation signed, sealed and executed the above mentioned four certificates of stock and delivered them to Clarey, the agent of the corporation, for delivery to plaintiffs, who are now the holders and owners thereof; that these certificates were not exempt from compliance with the provisions of the Securities Act; that plaintiffs paid the corporation \$1100 for the certificates of stock, but have since tendered them to the defendants and demanded the return of their money; and that defendants have refused and still refuse to return the money.

In their amended affidavit of merits defendants deny all the material allegations of the amended statement of claim and aver that plaintiffs became purchasers of the stock in the Diversey Parkway Hospital under a preorganization agreement; that the organizers of said corporation determined to abandon its corporate existence and surrender its charter and return to the subscribers the money paid by the holders, or if they did not desire to accept the return of their money and so indicated there would be purchased for them an equivalent amount of stock in the North Chicago Hospital, Inc.; that plaintiffs requested the purchase of stock in the North Chicago Hospital; that such purchase was made and the stock tendered to them, which stock was refused.

Upon the trial defendants stipulated that the stock of the Diversey Parkway Hospital had not been qualified under the Securities Act.

Lizzie Gartner testified that May 12, 1930, she and Albert Gartner subscribed for twenty shares of common and ten shares of preferred stock of the Diversey Parkway Hospital and paid on account to Clarey \$275, with a cashier's check of the Lakeview State Bank bearing the same date, and that May 26, 1930, on behalf of herself and Albert Gartner, she paid \$325, the

balance of the subscription price of the stock and received on that date four certificates representing the stock subscribed for, signed by Guy L. Wagoner, as secretary, and Albert W. Seidel, as president of the corporation.

It appeared that defendants Guy L. Wagoner and Albert W. Seidel were in fact secretary and president of this corporation and that the corporation had employed Clarey to sell the stock to plaintiffs; that he also had charge of the sale of all stock sold as the financial agent of the corporation. It also appeared that the total amount collected from the sale of stock was \$14,917.97 and that of this amount \$4,140 was paid to Clarey on account of organization expenses, \$1,182.61 for miscellaneous expenses, such as salary of stenographer and bookkeeper, rent, telephone, telegraph, printing, etc., \$1,447 was refunded to subscribers and \$8,147.46 was used to purchase stock in the North Chicago Hospital.

Defendants contend: (1) That the stock sold to plaintiffs was not Class "D" stock as the same is defined by the Illinois Securities Act; (2) that, although they were respectively president and secretary of the Diversey Parkway Hospital, they did not sell nor "knowingly perform any act or in any way further such sale" of stock to plaintiffs; (3) that the stock issued to plaintiffs was purchased by them under preorganization subscriptions to the capital stock and that therefore under the terms of the Illinois Securities Act there was no necessity for qualifying the stock; (4) that the contract for the sale of the stock was not absolutely void but merely voidable and plaintiffs, having elected to take stock in the North Chicago Hospital in lieu of the stock subscribed for in the Diversey Parkway Hospital, are not entitled to recover.

This action was brought under clause 1 of section 37 of the Securities Act, Cahill's Ill. Rev. St., ch. 32, par. 290, which provides as follows:

balance of the subscription price of the stock and received on that date from the subscription price of the stock subscribed for, signed by the corporation, as secretary, and dated 1st March, 1904, and received on that date from the subscription price of the stock subscribed for, signed by the corporation, as secretary, and dated 1st March, 1904.

It appeared that defendant Guy L. Rogers and others were in fact secretary and president of this corporation and that the corporation had employed Guy L. Rogers to sell the stock to plain- tiffs; that he also had charge of the sale of all stock sold on the financial agent of the corporation. It also appeared that the total amount collected from the sale of stock was \$11,317.00 and that of this amount \$4,100 was paid to Guy L. Rogers as secretary of the corporation. \$1,100.00 for miscellaneous expenses, such as salary of secretary and bookkeeper, rent, telephone, postage, printing, etc., \$1,100.00 was returned to subscribers and \$6,117.00 was paid to the North Chicago Hospital.

Defendant contends (1) that the stock sold to plaintiffs was not class "C" stock as the same is defined by the Illinois Corporation Act; (2) that, although they were representative investors and members of the Riverway Hospital, they did not sell or knowingly permit any set or in any way further such sale; or stock to plaintiffs; (3) that the stock issued to plaintiffs was purchased by them under representation and subscription to the capital stock and that therefore under the terms of the Illinois Corporation Act there was no necessity for qualifying the stock (4) that the contract for the sale of the stock was not absolutely void but merely voidable and plaintiffs, having elected to take stock in the North Chicago Hospital in lieu of the stock subscribed for in the Riverway Hospital, are not entitled to recovery.

This action was brought under Article 1 of Chapter 17 of the Illinois Code, Chapter 111, Section 100, which reads:

Section 100. Chapter 111.

"Every sale and contract of sale made in violation of any of the provisions of this act shall be void at the election of the purchaser, and the seller of the securities so sold, the officers and directors of the seller, and each and every solicitor, agent or broker of or for such seller, who shall have knowingly performed any act or in any way furthered such sale, shall be jointly and severally liable, in an action at law or in equity upon tender to the seller or in court of the securities sold, to the purchaser for the amount paid, the consideration given or the value thereof, together with his reasonable attorney's fees in any action brought for such recovery."

Defendants urge under their first contention that the burden was on plaintiffs to prove that the stock sold was Class "D" stock, and that they failed to make proof to that effect in that nothing appeared in the record except the stipulation of the parties that the securities in question were not qualified under the Illinois Securities Act. The case of Pist v. Chartrand, 237 Ill. App. 117, cited by defendants, held that under sec. 37 of the Securities Act the burden of proof that the stock sold was in Class "D" was upon plaintiff but that once it appeared that the stock was in Class "D", defendant then had the burden of establishing any exemption relied upon as a defense. It is agreed that this is a correct pronouncement of the law. In that case all that was offered by way of evidence was the certificate of the secretary of state certifying that the corporation had filed no statement in his office as provided in secs. 7 and 9 of the Securities Act and it was there contended, the certificate having been introduced in evidence, that the burden was upon defendant to show that the sale of stock did not fall within the provisions of the Act. No evidence whatever was offered in that case as to the history of the company, its assets or liabilities, its solvency or insolvency, nor as to the character of the stock under the Illinois Securities Act. In that case the court in our opinion properly held as above indicated.

In addition to the stipulation that the stock involved had not qualified under the Act, the evidence in the case at bar shows that May 2, 1930, the Diversey Parkway Hospital received its charter from the Secretary of State of the State of Illinois. which

charter was recorded in the Recorder's office of Cook county, May 9, 1930; that the corporation was organized for the purpose of erecting a hospital at 731 Diversey Parkway, Chicago, Illinois; that its capital stock of \$1,500,000 was divided into \$1,000,000 of preferred stock of the par value of \$100 a share, and \$500,000 of common stock of the par value of \$5 a share; that the seven original incorporators, two of whom are the defendants in this case, were also the only subscribers and the directors for the first year; that these seven subscribers subscribed for a total of 400 shares of common stock for which they paid \$2,000; that only \$14,917.07 was collected from the sale of stock and that this amount comprised the total assets of the corporation; that three months after its organization the corporate project was abandoned and that such part of the money realized from the sale of stock as had not been spent for organization purposes was either returned to the subscribers or used to purchase stock in another venture, The North Chicago Hospital.

Sec. 3 of the Securities Act, Cahill's Ill. Rev. St., ch. 32, par. 256, classifies securities into four general divisions, which are as follows:

"(1) Securities, the inherent qualities of which assure their sale and disposition without the perpetration of fraud, which shall be known as securities in Class 'A';

(2) Securities, the inherent qualities of which, or in the nature of one or both parties to the sale thereof, assure their sale and disposition without the perpetration of fraud, which shall be known as securities in Class 'B';

(3) Securities based on established income, which shall be known as securities in Class 'C';

(4) Securities based on prospective income, which shall be known as securities in Class 'D'."

Sec. 8 of the Securities Act defines Class "D" securities as follows:

"All securities other than those falling within Class 'A', 'B', 'C' and other securities of organizations described as 'investment trusts,' and 'investment contracts,' respectively, shall be known as securities in Class 'D'."

This and other sections of the Securities act were construed

chapter was presented in the Secretary's office of Cook County, Ill.
It is stated that the corporation was organized for the purpose of
acquiring a building at 711 Broadway, Chicago, Illinois, and
its capital stock of \$1,000,000 was divided into 100,000 shares
of \$10.00 each. The corporation was organized in 1907 and
common stock of the par value of \$10.00 a share; that the seven original
incorporators, two of whom are the defendants in this case, were also
the only subscribers and the directors for the first year; that there
seven subscribers subscribed for a total of 400 shares of common
stock for which they paid \$4,000.00; that only \$14,000.00 was collected
from the sale of stock and that this amount constituted the total
assets of the corporation; that three months after its organization
the corporate funds were exhausted and that each part of the money
received from the sale of stock had been spent for organization
purposes and other expenses in the maintenance of the corporation
stock in another venture, The North Chicago Hospital.
Part 2 of the certificate of incorporation of the corporation,
the 28th day of May, 1908, classifies securities into four general divisions,
which are as follows:
"(1) Securities, the interest holders of which receive
their share of dividends without the participation of time, which
shall be known as securities in Class 'A';
"(2) Securities, the interest holders of which, or in
the future of one or more of their shares, shall be known as
securities without the participation of time, which shall
be known as securities in Class 'B';
"(3) Securities based on predetermined income, which shall
be known as securities in Class 'C';
"(4) Securities based on prospective income, which shall
be known as securities in Class 'D'.
Part 3 of the certificate set forth Class 'A' securities
as follows:
"All securities other than those falling within Class 'A',
'B', 'C' and 'D' are securities of organizations described as 'Investment
Trusts', and 'Investment contracts', respectively, shall be
known as securities in Class 'D'."
This and other portions of the Certificate are were contained

in Abrams v. Love, 254 Ill. App. 428, in which the court said on page 432:

"All securities other than those falling within classes 'A', 'B' and 'C' respectively, shall be known as securities in class 'D'. The only way therefore, to determine that a stock is in class 'D' is to eliminate classes 'A', 'B' and 'C'."

In the same opinion we read on page 434:

"Since there is nothing to show that the securities belong to either class 'A', 'B' or 'C', there is no other place for them to lodge, except as class 'D' securities."

On page 436 we find the following language:

"To place the burden upon the plaintiff of proving that the stock in question was not exempted under the act would have the effect of destroying the beneficial purpose intended by the legislature when it enacted the statute."

It is apparent from the facts disclosed by the evidence and the history of this corporation that the stocks sold did not come within Classes "A", "B" or "C", as defined by the Securities Act. It must, therefore, have been stock that came within Class "D".

We find no merit in defendants' second contention that they as president and secretary of the corporation did not directly sell nor "knowingly perform any act or in any way further such sale" of stock. It is only necessary to point out that when they attached their signatures to the stock certificates they performed an act that furthered the sale of this stock. Without their signatures on the certificates this stock could not have been sold. They also furthered the sale of this stock as officers of the Riverway Parkway Hospital by the employment of Clarey as the financial agent of the corporation to sell all of the stock that was sold, including the stock sold to plaintiffs. Although but \$14,917.07 was collected from the sale of the stock, \$5,322.61 was paid to Clarey for expenses incurred in connection with the organization of the corporation. Although defendants did not know plaintiffs personally and did not directly sell them the stock they made it possible for Clarey to sell it to them and it therefore follows that they did knowingly perform acts

that furthered the sale. In the case of Abrams v. Love, supra. the court in discussing this question said on page 439:

"To agree with the contention of appellants that because it does not appear that either Love or Simonsen took part in making the particular sale involved in this suit and because they both denied they had any knowledge of the sales to appellee, they cannot be held liable to the purchaser, is in effect, to hold that they might be liable criminally for knowingly performing some act or in some way furthering sales generally but could escape civil liability as to any resulting sale they did not specifically further or know about. A rather anomalous result. It would seem more consonant with reason to hold that when one knowingly performs acts and in some way furthers sales generally, he shall be liable to any purchaser the same as if what he did to further sales generally had been directed to the consummation of each sale that results whether he had knowledge of the effort of a solicitor to make that particular sale or not."

In the case of Wehrwein v. Eastman Springs Beverage Co.,

238 Ill. App. 443, 445, where there was a judgment against the president and secretary of the corporation for noncompliance with the provisions of the Securities Act, the following language was used by the court:

"The presence of fraud is not a condition of liability of any one selling or furthering the sale of such stock. The statute embraces all such transactions, whether made in good faith or not. Whether it is a harsh law and may frequently work an injustice is no concern of this court. The legislature passed the law and the Supreme Court held it constitutional. If it is shown that the company did not comply with the statute, and the defendants sold or knowingly performed any act in any way furthering the sale of such securities, they are liable upon a tender of the certificate of stock."

In support of their third contention that this stock was purchased under a preorganization subscription to the capital stock and that as such it was unnecessary to qualify it under the Securities Act, they stress the point that one subscription form undated, and a similar form under date of May 1, 1930, in the following language were signed by plaintiffs or one of them:

"I hereby subscribe for five units of the capital stock of the Diversey Parkway Hospital, Inc., which is a corporation to be organized under the laws of the State of Illinois.

"It is hereby understood and agreed that certificates will be issued to me when the corporation is duly organized, and it is further understood and agreed that said corporation will be organized within thirty days from the date hereof.

"If said corporation is not organized within thirty days from this date then I will receive all of the money paid in on this

preorganization subscription without deduction of any nature."

This is beyond question a preorganization form of subscription but it can hardly be seriously contended that plaintiffs are precluded from recovery simply because the agent of this corporation had them sign this form of subscription. Plaintiffs insist that it was many days after the corporation had been organized and the charter issued to it that they subscribed for the stock. The charter was issued to the Diverssey Parkway Hospital May 2, 1930, and by reason of the fact that one of the stock subscriptions was dated May 1, 1930, defendants urge that it was conclusive that at least one of the subscriptions was made one day prior to the incorporation of the Diverssey Parkway Hospital.

There is some conflict in the evidence as to the date of the stock subscriptions. Plaintiff Lizzie Gartner was positive in her testimony that she subscribed for the stock May 12, 1930, the same date that she made the initial payment of \$275. Her bank book, which was in evidence, showed a withdrawal of that amount on that date, and the cashier's check of the Lakeview State Bank for that amount, also in evidence, which was purchased by her with the money withdrawn from her bank account and which was given to Clarey as first payment on the stock subscribed for, corroborated her testimony. The balance of the subscription \$325, was not paid until May 26, 1930, and the certificates of stock were issued on that date. In any event we feel that the trial court, having heard the evidence and having had an opportunity to observe the witnesses, was justified in finding regardless of the character of the subscription form used by the corporation and presented to the plaintiffs for their signatures, that this subscription was not a preorganization subscription for capital stock but was a subscription for stock that was made and the certificates evidencing same issued after the incorporation and the issuance and recording of the charter.

Defendants advanced further arguments under this contention but inasmuch as they were predicated on the theory that the subscriptions were preorganization subscriptions, and we have concluded that the trial ^{court} was warranted in holding otherwise, it is unnecessary to consider them.

Defendants' fourth contention that plaintiffs cannot recover because they agreed to take stock in the North Chicago Hospital in lieu of the stock of the Diversy Parkway Hospital, after they had been advised that the Diversy Parkway Hospital project had been abandoned, is untenable. It is difficult to believe that these innocent and unwary victims, having been taken in once and having been apprised of the fact, would willingly and unhesitatingly fall for Clarey's blandishments the second time. It is urged that they were offered the opportunity of receiving back their cash or putting it into the same number of shares in a similar corporation, and they chose the latter course. The plaintiff Lizzie Gartner in her testimony insists that that was not the fact. She testified that when she heard that the Diversy Parkway Hospital project had been abandoned she immediately went to Clarey and demanded the return of the money paid by herself and Albert Gartner for the Diversy Parkway Hospital stock and that Clarey, holding three checks in his hand, stated that he could not pay her unless and until she signed a paper which he presented to her and that he surreptitiously secured her signature to this paper which later proved to be an agreement on her part to take shares of stock in the North Chicago Hospital in exchange for her stock in the Diversy Parkway Hospital. The defendants disputed this evidence but we again feel that the trial court was warranted in its conclusion in plaintiffs' favor. The weakness of defendants' contention is manifested by their admission that, notwithstanding their claim that plaintiff Lizzie Gartner signed a subscription

order for stock in the North Chicago Hospital August 21, 1930, they never even offered to deliver this stock to plaintiffs until the close of the trial of the instant case, almost two years later. The certificates of stock in the North Shore Hospital tendered to plaintiff at the trial were dated September 18, 1930, and were signed by defendant Wagoner, as secretary, and one Hoyt, who was one of the original incorporators of the Diversey Parkway Hospital, as president.

We must conclude that Lissie Gertner told the truth and that she was imposed upon in this transaction by Clarey. It may be that Clarey also imposed upon defendants, but the fact remains that by their acts and conduct they put it within Clarey's power and made it possible for him to secure the money of plaintiffs by the sale of shares of stock that were entirely speculative and that were unquestionably Class "E" securities under the Blue Sky Law, the future income from which was prospective. This stock was sold without complying with the provisions of the Securities Act and upon the election of the purchaser the sale was void and defendants are clearly liable for the money paid for this stock.

Defendants contend that so long as they did not directly sell this stock, and that because Clarey who did sell the stock was not their individual agent but the agent of the Diversey Parkway Hospital, they cannot be held liable under the Blue Sky Law. These defendants were respectively president and secretary and also directors of this corporation; they were among the seven original incorporators and they knew that the charter issued to this corporation authorized the issue of \$1,500,000 capital stock; they knew that they each had subscribed and paid for but sixteen shares of common stock at \$5 a share and that the total amount of the assets of the Diversey Parkway Hospital May 2, 1930, the date of its incorporation was \$2,000, which was cash paid for the stock subscribed by the

which was made in the North Atlantic Ocean on May 1, 1934.
 They never even offered to believe this story as plausible
 until the close of the trial at the instant when, almost two
 years later. The verifications of stock in the North Atlantic
 Hospital returned to plaintiff at the trial were dated September
 12, 1935, and were signed by defendant's counsel, as plaintiff
 and not 1934, who was one of the original incorporators of the
 Diversey Railway Hospital, as plaintiff.
 We must conclude that these documents were the work
 and that this was imposed upon in this transaction of 1934.
 It may be that they also imposed upon defendant, but the fact
 remains that by their acts and conduct they put in within 1934's
 report and made it possible for him to receive the money at plaintiff's
 by the sale of shares of stock that were entirely speculative and
 that were unprofitably made by plaintiff when the time was
 low, but future income from which was speculative. This stock was
 sold without receiving with the provisions of the corporation and
 and upon the situation of the present the sale was void and
 defendant was clearly liable for the money paid for this stock.
 Defendant cannot claim that he took it that he was clearly
 will take stock, and that because they are all will the stock
 was not their individual assets but the assets of the Diversey Railway
 Hospital, they cannot be held liable under the law. These
 defendants were respectively president and secretary and vice-presi-
 dent of this corporation; they were among the seven original incor-
 porators and they knew that the charter issued in this corporation
 authorized the issue of \$1,500,000 capital stock; they knew that
 they each had subscribed and paid for but sixteen shares of common
 stock at \$5 a share and that the total amount of the assets of the
 Diversey Railway Hospital May 2, 1934, the date of the incorporation
 was \$2,500, which was cash paid for the stock subscribed by the

incorporators; and they knew that there were no earnings or income and that there could not possibly be any earnings for a considerable time, if ever. They as officers and directors of the corporation are conclusively presumed to have been familiar with the employment of Clarey as the agent authorized to sell this stock, which was purely speculative. If, under such circumstances the officers of a corporation can evade responsibility for the sale of stock of a corporation whose principal asset lies in the smoothness of its selling agent and the gullibility of the purchaser, especially when they have full knowledge that the stock has no earning capacity and that the corporation is not even a going concern, on the theory that the actual sales were not made by them but by an agent authorized by the officers and directors of the corporation to act for it, then the Blue Sky Law is of no avail as a protection to the public.

The motions of plaintiffs heretofore made to strike the abstract and dismiss the appeal of defendants, which were reserved, are denied.

For the reasons stated we are of the opinion that the Municipal court was justified in its finding and its judgment is affirmed.

AFFIRMED.

Scanlan, P. J., and Gridley, J., concur.

and they knew that there were no earnings or income
and that there could not possibly be any earnings for a considerable
time. At once, they as officers and directors of the corporation
and collectively presumed to have been familiar with the employment
of Olney as the agent authorized to sell this stock, which was
purely speculative. It, under such circumstances the officers of
a corporation can evade responsibility for the sale of stock of a
corporation whose principal assets lie in the management of its
selling agent and the quality of the purchase, especially
when they have full knowledge that the stock has no earning cap-
acity and that the corporation is not even a going concern, on the
theory that the actual sales were not made by them but by an agent
authorized by the officers and directors of the corporation to do
for it, then the time they law is of no avail as a protection to

the public.

The motion of Plaintiff's Petitioner made to strike
the exhibits and limit the agent of defendant, which were

reverted, was denied.

For the reasons stated we are of the opinion that

the Municipal Court was justified in its finding and its

judgment is affirmed.

ATTORNEYS

Respectfully,
J. H. and G. H. J. J.

36365

WEST SIDE TRUST & SAVINGS BANK,
as trustee,

Appellant,

v.

DAVID BRONSTON,

Appellee.

APPEAL FROM MUNICIPAL
COURT OF CHICAGO.

270 I.A. 630³

MR. JUSTICE SULLIVAN DELIVERED THE OPINION OF THE COURT.

The West Side Trust & Savings Bank commenced an action of forcible detainer against defendant alleging that it was entitled to the possession of the apartment in question and that defendant unlawfully withheld possession of the premises from plaintiff. The court entered judgment in favor of defendant and assessed the costs against plaintiff. This appeal followed.

The case was tried upon a stipulation of facts in which it was agreed:

"That plaintiff was the trustee in a certain trust deed conveyance which conveyed the premises involved in these proceedings together with all of the rents, issues and profits thereof to secure the payment of a sum of money aggregating \$47,000; that a default had occurred in the payment of principal due under said trust deed amounting to \$1,196.60 on November 16, 1931; that default also had occurred in the payment of principal of \$2,000 and interest of \$1,260 both due May 16, 1932 and that by reason of such defaults and by reason of the right given plaintiff in the trust deed the plaintiff served notice on May 29, 1932, upon all persons in possession of the premises thereby conveyed of its election to enter into the possession of the premises securing such money and attempted to exercise the rights in the trust deed contained; that one of the flats in said premises was occupied by the defendant, who failed and refused to pay the July rent to the plaintiff in accordance with the demand made upon him by the plaintiff, and thereupon the complaint in forcible detainer was filed against him; and that the lease of the defendant was made subsequent to the date of the trust deed."

The facts in this case are substantially the same as in
West Side Trust & Savings Bank v. Garstein, General No. 36453.
(opinion filed by first division of this court April 10, 1933,

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THE FIRST NATIONAL BANK OF CHICAGO

The First National Bank of Chicago
is a corporation organized under the laws of the State of Illinois.
The bank is authorized to do all the business of a bank and to
exercise all the powers and privileges of a bank.
The bank is authorized to receive deposits of money and to
pay out the same on demand or at such other times as may be
directed by the board of directors.
The bank is authorized to issue and to redeem its own notes and
to receive deposits of money and to pay out the same on demand or
at such other times as may be directed by the board of directors.
The bank is authorized to make loans and to receive interest thereon
at such rate as may be determined by the board of directors.
The bank is authorized to do all the business of a bank and to
exercise all the powers and privileges of a bank.

which is the same

THE FIRST NATIONAL BANK OF CHICAGO
is a corporation organized under the laws of the State of Illinois.
The bank is authorized to do all the business of a bank and to
exercise all the powers and privileges of a bank.
The bank is authorized to receive deposits of money and to
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The bank is authorized to do all the business of a bank and to
exercise all the powers and privileges of a bank.

The First National Bank of Chicago

THE FIRST NATIONAL BANK OF CHICAGO

THE FIRST NATIONAL BANK OF CHICAGO

not yet published.) The judgment rendered below in that case was the same as in this and the same questions were there presented for review.

We agree with the reasons set forth in that opinion and the conclusions reached; therefore the judgment of the Municipal court in the instant case is reversed and the cause remanded with directions to the trial court to enter a judgment in favor of plaintiff and against defendant.

REVERSED AND REMANDED WITH DIRECTIONS.

Scanlan, P. J., and Gridley, J., concur.

There should not be any further delay in the completion of the work.

It agrees with the previous two levels in that ordering

and the resulting results; therefore the subject of the

UNCLASSIFIED CONFIDENTIAL

Approved: A order of June 1961 of the Board of Health and Safety

4. Approved personnel have authority to report on

3. ADDITIONAL INFORMATION CONCERNING THE SUBJECT

36374

BERTHA E. JOHNSTON,
Appellee,

vs.

CITY OF CHICAGO, a Municipal
Corporation,
Appellant.

APPEAL FROM SUPERIOR COURT
OF COOK COUNTY.

270 T.A. 630⁴

MR. JUSTICE SULLIVAN DELIVERED THE OPINION OF THE COURT.

This is an appeal of the defendant, City of Chicago, from a judgment entered in the Superior court of Cook county on the jury's verdict for \$1280 on account of personal injuries alleged to have been sustained by Bertha E. Johnston, plaintiff, as a result of a fall when she stepped into a hole in the pavement of the street as she alighted from a street car on Irving Park boulevard, Chicago. The Chicago Surface Lines was also made a party defendant but on motion of the plaintiff the case was dismissed as to it.

The plaintiff's declaration consisted of one count which charges in substance that before and on April 24, 1931, the defendant, City of Chicago, was in possession and control of Irving Park boulevard and Keade street in said city; that it negligently permitted those streets to be and remain in bad and unsafe condition and allowed to exist a hole at or near the east cross walk of the intersection of the aforementioned streets immediately north of the west bound car tracks on Irving Park boulevard; that the Chicago Surface Lines was operating a street car on which the plaintiff became a passenger and it was the duty of the defendants to afford the plaintiff an opportunity of alighting safely from the car; that the Chicago Surface Lines negligently brought this car to a stop opposite this hole or depression in the pavement of the street and by reason thereof the plaintiff, while alighting or about to alight from the street car with due care and caution, stepped into or upon the hole

CHICAGO, ILLINOIS
JANUARY 1, 1934

STY0 I.A. 6304

MR. JUSTICE WILLIAM BRIDGES THE CHIEF OF THE COURT.

THIS IS an appeal of the judgment of the City of Chicago, from

a judgment entered in the Superior Court of Cook County on the

11th day of January, 1934, on account of personal injuries alleged

to have been sustained by Edward E. Johnston, Plaintiff, as a result

of a fall when the alleged falls a hole in the pavement of the street

on the Plaintiff from a street car on Irving Park Boulevard, Chicago,

The Chicago Transit Lines was then and is now a party defendant and as

one of the Plaintiff the case was dismissed as to it.

The Plaintiff's declaration consisted of two counts which

charged in substance that before and on April 24, 1933, the defendant,

City of Chicago, was in possession and control of Irving Park

Boulevard and same street is said city; that it negligently per-

mitted those streets to be and remain in bad and unsafe condition

and allowed to exist a hole at or near the west corner of the

intersection of the aforementioned streets immediately north of the

west corner of the intersection of Irving Park Boulevard; that the Chicago

Transit Lines was operating a street car on which the Plaintiff pas-

senger was riding at the time of the defendant's alleged

negligence and as a result of said negligence the Plaintiff was injured

and sustained damages to his person and property and as a result

of the defendant's negligence he was forced to incur expenses

for medical treatment and for the cost of his lost wages and

other damages and as a result thereof he was forced to incur

or depression in the pavement and was thrown to the ground and injured; and that proper statutory notice was served on the city attorney and city clerk of the City of Chicago.

The defendant contends that the trial court erred in overruling the defendant's motion for a directed verdict at the close of all the evidence and urges in support of this contention that the plaintiff was clearly guilty of contributory negligence or that she failed to prove that she was not guilty of contributory negligence.

The defendant offered no evidence on the trial of this case, and we do not propose to discuss the evidence introduced by the plaintiff except to say that not only was it not disputed, contradicted or impeached, but that it showed clearly that the plaintiff was not guilty of contributory negligence. Even had there been some conflict in the evidence on the issue of contributory negligence, the law is well settled that contributory negligence is always a question of fact for the jury except when its existence is so clear that no reasonable minds could come to a contrary conclusion. This doctrine has been enunciated by the courts of this and other states and is clearly set forth in Lundquist v. Chicago Ry. Co., 305 Ill. 106, 112:

"It is only where all reasonable minds agree that a certain state of facts is established that the question can be raised as to whether or not those facts constitute negligence as a matter of law. If reasonable minds differ on what the facts are, the question of negligence is a question of fact for the jury under the instruction of the court as to the law."

The defendant next contends that the trial court erred in giving the following instruction at the request of the plaintiff:

"The court instructs the jury that it is the duty of the city to use reasonable diligence to keep the street in question in a reasonably safe condition, if the jury believe from the evidence that the defendant failed to perform such duty, that by reason of its negligence in that regard the said street was permitted to remain out of repair and in a dangerous condition, by reason whereof the plaintiff received the injury complained of then the defendant is liable if the plaintiff at the time was in the exercise of ordinary care for her own safety."

at deposition in the presence and was sworn to the facts and in-
terest; and that proper discovery notices were served on the city
attorney and city clerk of the City of Chicago.

The defendant contends that the trial court erred in over-
ruling the defendant's motion for a directed verdict at the close
of all the evidence and right in support of this contention that
the plaintiff was clearly guilty of contributory negligence or that
she failed to prove that she was not guilty of contributory negli-

gence.

The defendant offered no evidence on the trial of this
case, and we do not propose to discuss the evidence introduced by
the plaintiff except to say that not only was it not disputed, nor
excluded or impeached, but that it showed clearly that the plain-
tiff was not guilty of contributory negligence. Even had there
been some conflict in the evidence on the issue of contributory
negligence, the law is well settled that contributory negligence is
always a question of fact for the jury except when the evidence
is so clear that no reasonable mind could come to a contrary con-
clusion. This doctrine has been enunciated by the courts of this
and other states and is clearly set forth in *Wheeler v. Chicago*
Electric Ry. Co., 103 Ill. 2d, 112.

"It is only where all reasonable minds agree that a certain
fact or facts is established that the question can be taken as
whether or not there is contributory negligence on a matter of law.
If reasonable minds differ on what the facts are, the question of
negligence is a question of fact for the jury under the instructions
of the court as to the law."

The defendant also contends that the trial court erred in
refusing the following instruction as the request of the plaintiff:

"The court instructs the jury that it is the duty of the
city to keep its sidewalks in repair the extent in question is
a reasonably safe condition. If the jury believe from the evidence
that the sidewalk failed to provide such duty, that by reason of
the negligence in fact regard the said street was permitted to be
made out of repair and in a dangerous condition, by reason whereof
the plaintiff received the injury complained of then the defendant
is liable to the plaintiff at the time was in the exercise of
ordinary care for her own safety."

It is readily apparent that in copying these instructions the conjunction "and" was omitted in the third line before the word "if" and in the fourth line before the word "that", and that these omissions were mere typographical errors. We fail to see how this instruction, especially when read as a part of the series of all the instructions given, could mislead the jury. That the defendant was fully protected by proper instructions given on its behalf admits of no argument. At the defendant's request the court submitted to the jury the following instruction:

"If you believe from the evidence that at the time and place in question the plaintiff was negligent and that such negligence on her part proximately contributed to cause the alleged accident, then you are instructed that she cannot recover in this case, irrespective of whether you believe that the defendant was or was not negligent."

If the instruction of the plaintiff, criticized by the defendant because of the inadvertent omission of the word "and" twice, was ambiguous or created any misconception in the minds of the jurors, the above instruction given at the request of the defendant and other defendant instructions afforded them a true exposition of the law applicable to this case. The principle that mere technical error will not warrant a reversal unless it is prejudicial to the complainant is well expressed in Heckle v. Greve, 125 Ill. 58, 63, wherein the court said:

"Courts of review reverse only for such errors as may have been prejudicial to the complaining party, and certainly no error or number of errors can, with any propriety, be said to prejudice a party, when it is clear, as it is here, that the judgment upon the conceded facts is the only one that could properly be rendered, and that another trial would therefore necessarily result in the same way."

Discussing the same proposition the court said in West Chicago St. Ry. Co. v. Maday, 138 Ill. 304, 310:

"When the court can see from the record that an error committed by the trial court in the progress of the case was a harmless one, or that its injurious effect or harmful character was obviated, so as not to affect injuriously, in the final judgment, the rights of the party against whom the error was committed, it should not be allowed to work a reversal. It is more important in

It is readily apparent that in copying these instructions the transcription "and" was inserted in the first line before the word "and" and in the fourth line before the word "and", and that these omissions were mere typographical errors. We tell you how this happened, especially when read in a part of the notes of all the instructions given, would indicate the fact. And the defendant was fully protected by proper instructions given on the behalf of the defendant. As the defendant's request for a new trial was denied, the following instructions were given:

"If you believe from the evidence that at the time and place in question the plaintiff was negligent and that such negligence on his part proximately caused the death of the plaintiff, then you are instructed that the defendant is liable for the death of the plaintiff and the defendant is not negligent."

If the instruction of the plaintiff, contained by the defendant because of the instruction omission of the word "and", was ambiguous or created any misconception in the minds of the jury, the above instruction given in the request of the defendant and other defendant instructions afforded them a fair and proper position of the law applicable in this case. The principle that mere technical error will not warrant a reversal unless it is prejudicial to the complainant is well expressed in Smith v. Smith, 125 Ill. 2d, 63, wherein the court said:

"Where an error appears in the instructions given to the jury, it is not sufficient to require reversal unless it is shown that such error was prejudicial to the complainant. It is said by the court in Smith v. Smith, 125 Ill. 2d, 63, that the instructions given to the jury in the case at bar were not prejudicial to the complainant and that the error was not prejudicial to the complainant."

Defendant's new trial motion was denied and the court said in part:

"When the court has given the jury instructions which are correct and proper and the jury has returned a verdict in favor of the defendant, it is the duty of the court to sustain the verdict. It is not the duty of the court to set aside the verdict of the jury unless it is shown that the instructions given to the jury were prejudicial to the complainant. In the case at bar, the instructions given to the jury were not prejudicial to the complainant and the court's decision to deny the new trial motion was correct."

the administration of justice that litigation should end in the attainment of substantial justice, than that a record of the proceedings should be built up which is without flaw or blemish."

Further contentions have been advanced by the defendant, but we find them to be entirely without merit. A careful analysis of this evidence warrants the conclusion that the verdict and judgment were amply supported by the evidence, both as to the liability of the defendant and the extent of the plaintiff's injuries and damage. It is our opinion that this record is singularly free from error and that substantial justice has been done in this case.

Plaintiff asks that the statutory penalty be imposed on the ground that the appeal herein is prosecuted solely for purposes of delay. While it is true that some delay ensued by reason of this appeal, we do not regard this delay as vexatious within the meaning of the statute, and consequently are not disposed to allow statutory damages.

For the reasons indicated herein the judgment of the Superior court is affirmed.

AFFIRMED.

Seanlan, P. J., and Gridley, J., concur.

The administration of justice is a public trust and in the administration of justice, the public interest is paramount. It is the duty of the courts to see that the law is administered in accordance with the public interest and that the rights of the parties are protected.

Further contentions have been advanced by the defendant,

and we find them to be entirely without merit. A careful analysis of this evidence warrants the conclusion that the verdict and judgment were amply supported by the evidence, both as to the liability of the defendant and the extent of the plaintiff's injuries and damages. It is our opinion that this record is amply sufficient to

show that the defendant's liability has been established in this case.

Plaintiff asks that the judgment be reversed and the case remanded for a new trial.

It is our opinion that the evidence is sufficient to support the verdict and judgment. The defendant's liability is established by the evidence and the extent of the plaintiff's injuries and damages is also established. The verdict and judgment are supported by the evidence and are in accordance with the law. It is our opinion that the judgment should be affirmed.

For the reasons stated above, the judgment of the court is affirmed.

It is so ordered.

WITNESSED my hand and the seal of the court at the City of New York, this 10th day of June, 1910.

JOHN W. WALKER, Clerk of the Court.

36403

HARRY J. FIREMAN,
Appellee,

v.

OLIVER F. SMITH,
Appellant.

APPEAL FROM SUPERIOR COURT,

COOK COUNTY.

270 I.A. 631⁴

MR. JUSTICE SULLIVAN DELIVERED THE OPINION OF THE COURT.

Upon the petition of appellee (hereinafter referred to as plaintiff) the Superior court entered the following order, July 1, 1931:

"Ordered, adjudged and decreed that the defendant forthwith turn over, deliver and assign to said receiver (the Union Bank of Chicago) all his right, title and interest in and to 301 shares of stock in the Citizens Trust and Savings Bank and all of his right, title and interest in and to the chose in action now pending in the circuit court of Cook county, entitled Oliver F. Smith vs. William Hughes."

This appeal followed the entry of the order.

Alleging in his assignment of errors that certain constitutional questions were involved the appellant (hereinafter referred to as the defendant) prosecuted his appeal direct to the Supreme Court. The Supreme Court in Fireman v. Smith, 347 Ill. 108, 109, in transferring the appeal to this court, said:

"While appellant in his assignment of errors has alleged that certain constitutional questions are involved in this case, a study of the abstract and appellant's brief discloses the fact that the matters of which he complains do not involve a construction of the constitution but only raise questions of procedure and the correctness of the decree. No question is raised by the appeal which justifies this court to directly review the decree of the trial court. It is the duty of this court to decline to proceed in a cause where jurisdiction to determine is wanting. (Will v. Voliva, 344 Ill. 510.) The cause will therefore be transferred to the Appellate Court for the First District."

By his bill of complaint filed in the Superior court October 1, 1928, against defendant, Oliver F. Smith, plaintiff, Harry J. Fireman, sought to subject certain property alleged to

belong to defendant to the lien of a judgment theretofore entered against defendant. A final decree was entered in this cause June 27, 1930, finding "defendant's interest in said 301 shares (of stock of the Citizens Trust and Savings Bank) is subject to the lien of complainant's judgment" and "that whatever interest defendant has in said suit (against William Hughes) is subject to the lien of complainant's judgment."

This division of the Appellate court in its opinion filed March 24, 1931, Gen. No. 34579, on an appeal from the final decree of the Superior court, affirmed the final decree. Defendant petitioned the Supreme court for certiorari, which petition was denied.

Subsequent to the affirmance of the final decree by the Appellate court and denial of the certiorari by the Supreme court, plaintiff petitioned the court, July 1, 1931, to enter a rule upon defendant to forthwith deliver and assign to the receiver all his right, title and interest in the shares of stock and chose in action specified in the final decree. In accordance with the prayer of the petition the order of July 1, 1931, was entered directing defendant to forthwith turn over, deliver and assign to the receiver all his right, title and interest in the property which the final decree had found to be subject to the lien of plaintiff's judgment. Defendant contends that the order appealed from is contrary to law; void for want of jurisdiction; deprives defendant of his property without due process of law contrary to section 2, article 11 of the Illinois Constitution; deprives defendant of his remedy in the laws for injuries he has received in his property and deprives him of right and justice in violation of section 19, article 11 of the Illinois Constitution; and denies defendant the equal protection of the laws in violation of amendment 14 of the United States Constitution.

Plaintiff contends that no assignments of error are now

before he defendant to the fact of a judgment therefore entered
against defendant. A final decree was entered in this case June
27, 1937, finding "defendant's interest in said oil mineral (as
stock of the Citizens Trust and Savings Bank) is subject to the claim
of complainant's judgment" and "that whatever interest defendant has
in said unit (against William Hughes) is subject to the claim of
complainant's judgment."

This division of the appellate court in its opinion filed
March 24, 1937, 1031, 1032, 1033, on an appeal from the final decree
of the circuit court, affirmed the final decree. Defendant petitioned
the Supreme Court for a writ of certiorari, which petition was denied.
Petitioner to the Supreme Court at the final decree by the
appellate court and denial of the certiorari by the Supreme Court.
Petitioner petitioned the court, July 1, 1937, to enter a writ upon
defendant to forthwith deliver and assign to the receiver all his
right, title and interest in the shares of stock and share in action
specified in the final decree. In accordance with the prayer of the
petition the order of July 1, 1937, was entered directing defendant
to forthwith turn over, deliver and assign to the receiver all his
right, title and interest in the property which the final decree had
found to be subject to the claim of plaintiff's judgment. Defendant
contends that the writ specified form is contrary to law; that the
writ of jurisdiction against defendant of his property without due
process of law contrary to article II of the Illinois
Constitution deprives defendant of his remedy in the law for injuries
he has received in his property and deprives him of right and justice
in violation of section 13, article II of the Illinois Constitution;
and denies defendant the equal protection of the laws in violation of
section 14 of the United States Constitution.

Plaintiff contends that no assignments of error are now

made on this appeal which could not have been made in the appeal to this court from the final decree and that any errors that might have been assigned in the prior appeal and which were not so assigned were waived by defendant and that he is now precluded from a review of any phase of his case which he may have neglected to present on the former appeal.

Defendant's answer to the petition upon which this order is predicated alleges the impossibility of physical delivery of his interest in the bank stock, and the Circuit court suit for an accounting against William Hughes; that defendant "long before the entry of the decree" of June 27, 1930, had assigned to his attorneys of record on this appeal an interest in his claim on said bank stock and in his claim for an accounting; that the bank has failed and that defendant has filed a claim with the receiver of the Citizens Trust & Savings Bank for the value of the stock as of the date of an alleged conversion thereof by the bank. We are unable to discern how any or all of these facts could change or affect the rights of the parties to this appeal.

Plaintiff had no notice of any assignments from defendant to his attorney until notice of liens on behalf of the attorneys were served on Emma C. Hughes, executrix under the will of William Hughes, July 9, 1931, which was after plaintiff's petition upon which the order was predicated had been filed. Defendant's attorneys were the attorneys of record in all the litigation between the parties and they permitted the trial court to enter a decree finding that the previous judgment was a lien on the shares of bank stock and the interest of defendant in the suit against William Hughes pending in the Circuit court. They also permitted the Appellate court to affirm the decree and filed their petition for certiorari in the Supreme court without ever intimating by evidence,

made on this appeal which would not have been made in the appeal
 to this court from the trial court and that any error that
 might have been assigned in the trial court and which were not
 so assigned were waived by defendant and that he is now precluded
 from a review of any phase of his case which he may have neglected
 to present on the former appeal.

Defendant's answer to the petition upon which this order
 is predicated alleges the responsibility of plaintiff's failure to
 his interest in the bank stock, and the district court with respect
 accounting against William Hughes, and defendant's answer before
 the entry of the decree" of June 27, 1930, was assigned as his
 attorney of record on this appeal as interest in his claim and
 said bank stock and in his claim for an accounting; that the bank
 has failed and that defendant has filed a claim with the receiver
 of the Citizens Trust & Savings Bank for the value of the stock
 as of the date of an alleged conversion thereof by the bank.
 It was sought to transfer the stock to the bank and
 change or affect the rights of the parties to this appeal.

Plaintiff was an officer of the defendant from defendant
 to his attorney until notice of issue on behalf of the defendant
 was served on June 27, 1930, and after that date the will of William
 Hughes, July 2, 1931, which was after defendant's petition upon
 which the order was predicated had been filed.

Plaintiff was the attorney of record in all the litigation between
 the parties and they presented the trial court, as stated in answer
 showing that the previous judgment was a lien on the shares of
 bank stock and the interest of defendant in the said shares William
 Hughes pending in the district court. They also presented the
 plaintiff could be after the decree and filed their petition for
 judgment in the district court without ever submitting by evidence

intervening petition or otherwise that they claimed some right, title and interest in the bank stock and the suit pending in the Circuit court, although they now maintain that these assignments were made long before the entry of the final decree.

We find no errors assigned on this appeal that could not with equal propriety have been urged on the prior appeal. We find that we are called upon again to review the identical findings of the trial court that were reviewed by this division of the Appellate court in Fireman v. Smith, Gen. No. 34579, with reference to the bank stock and the suit for an accounting. The law has long been settled that a decision by a court of review is the law of the case on a second review. In People v. Young, 309 Ill. 27, 30, the court said:

"Where a cause is brought to this court and considered, its judgment as to all the points and questions presented and decided will forever conclude the parties, and if the cause is again brought before the court for review such questions cannot be reconsidered and they will not be open for discussion. Cases cannot be brought to this court and considered in fragments, and the court does not revise, review or change its decisions except in accordance with the rules and practice, which only permit such review upon a petition for rehearing. On the former appeal a petition for rehearing was presented and denied, and the law, including the construction of the command of the constitution that a school district shall be of such a character that all children within the district may have the benefit of the school and receive a good common school education, was settled and finally determined."

A strong pronouncement of this rule of appellate court procedure was made in People v. Militzer, 301 Ill. 234, 237, in which the court used the following language:

"The law is well settled that questions of law which have been decided by an appellate court on the appeal of a cause will not be again considered on a second appeal; that they are binding not only on the trial court in the further progress of the cause but also on the appellate court in any subsequent appeal. There is no mode provided by law, except it be upon a rehearing, whereby the final decision of a case in this court can be reversed or set aside at a subsequent term. There must be an end of litigation somewhere, and there would be none if parties were at liberty, after a case had received the final determination of the court of last resort to litigate the same matter anew and bring it again and again before the court for its decision." (Hollowbush v. McConnell, 12 Ill. 203.)"

...the court's decision in Ex parte ...
 ...in the ... and the ...
 ...court, although they now maintain that these ...
 ...were made long before the entry of the final decree.

...that no error occurred in this regard ...
 ...and also that the ... have been made on the ...
 ...to find that we are called upon again to review the ...
 ...findings of the trial court that were reviewed by this division
 ...of the ... Ex parte ...
 ...to the ... and the ...
 ...has been ... that a ... by a ...
 ...the law of the case on a second review. In Ex parte ...

...the court said:

"Where a decree is ... in this court and ...
 ...the judgment as to all the points and questions presented and decided
 ...will ... the ... and if the ...
 ...before the court for review ... cannot be ...
 ...and they will not be open for ...
 ...to this court and ... in ...
 ...review, review or change the ...
 ...rules and practice which only permit such review upon a petition
 ...for ... On the ...
 ...presented and ... and the law, ...
 ...of the ... a ...
 ...a ... all ... the ...
 ...of the school and ... education, ...
 ...and ..."

...a ... of the ...
 ...was made in Ex parte ...
 ...which the court used the following language:

"The law is well settled that ...
 ...have been decided by an appellate court on the ...
 ...will not be again ... on a second review; that ...
 ...disturb not only the trial court in the ...
 ...the ... and ...
 ...There is no ...
 ...whereby the final decision of a court in this ...
 ...as ...
 ...litigation ... and ...
 ...liberty, after a ... the final decision of the
 ...of ... the ...
 ...it again and again before the court for its ..."

Where the same parties, the same facts and the same issues are presented on an appeal that were presented on a prior appeal, the determination of the questions presented on the prior appeal will be held to be res judicata. In Keokuk Bridge Co. v. People, 185 Ill. 276, 279-80, the court held:

"In the case of Keokuk and Hamilton Bridge Co. v. People ex rel. 167 Ill. 15, being the same parties who are parties to the present record, this precise question was presented and determined. That assessment of the bridge there involved was for the year 1894. In that case, as in this, the assessor assessed 1567 feet of the bridge as being in the State of Illinois, and in that case, as in this, the issue was whether any part of the said 1567 feet of the bridge was in the State of Iowa. The contention was adjudicated adversely to this appellant, and is res judicata. Mueller v. Hennings, 102 Ill. 646; Jenkins v. International Bank, 111 Id. 462; Johnson v. Gibson, 116 Id. 294; Gould v. Sternberg, 128 Id. 510."

That the decision of the Appellate court is regarded as the law of the case on a second review is shown beyond any doubt in the case of Wilson v. Carlinville Nat. Bank, 87 Ill. App. 364, where the court used this significant language:

"Under the provisions of the Appellate Court act the previous opinion filed in this cause is of binding authority herein, and however much disposed we might be to reconsider the reasons of the court for its decision expressed in that opinion, we have no right to do so. Such a practice would produce judicial chaos. That opinion and the reasons and the judgment of the court, expressed upon the same facts in the same case before us, are binding upon the parties herein and upon the court. It would be as much impertinence for us, as it would have been for the trial court, to disregard our former opinion."

If errors exist which were not assigned on the first review defendant will not thereafter be permitted to assign them. This proposition of law was upheld in the leading case of Ogden v. Larrabee, 70 Ill. 510, 512, where the court announced the doctrine as follows:

"Notwithstanding the former decision is conceded to be conclusive as to the law of the case, it is insisted the alleged error may be considered, for the reason it was not assigned for error on the former hearing, and the court expressed no opinion as to the correctness of this particular item.

"It may be, it would subserve the ends of justice, in this instance, if we could consider the suggestion of error, but it would certainly introduce a pernicious practice not heretofore adopted in this State. There ought to be an end to all litigation, and if the doctrine insisted upon should be adopted, and the parties permitted to assign successive errors on the same record, in complicated litigation like this, no conclusive decision could be

rendered in the lifetime of the parties interested. The general rule on this subject is, that, where a cause has been heard in the circuit court, reviewed in the Supreme Court, and has been remanded with directions as to the decree that shall be entered, a party can not, on a subsequent appeal, assign for error any cause that accrued prior to the former decision. It is for the very satisfactory reason as stated in Sample v. Anderson, 4 Gilm. 546, 'it will be presumed, where a party sues out a writ of error and brings his case here for adjudication, and the same is determined upon the merits and errors assigned, that he has no further objection to urge against the record, and that if errors exist, which are not so assigned, they are waived.'

"The error complained of existed in the former record. The party had an opportunity then to assign it, and direct the attention of the court to it, but, having failed to do so, he ought to be estopped, upon every principle of justice, from alleging, at any future period, error in the same record. Had error intervened prior to the former adjudication, it was his duty to assign it, otherwise he will be deemed to have waived it forever. He will not be permitted to have his cause heard partly at one time and the residue at another."

The mandate of the Appellate court in the case at bar filed in the Superior court July 1, 1931, was merely an affirmance of the final decree, and the order from which this appeal is taken simply carried out the terms of that decree with respect to the bank stock and the suit for an accounting pending in the Circuit court; it sought to do nothing more than enforce the lien of the judgment on which the creditor's bill was based and was strictly in accordance with the decision of the Appellate court affirming the final decree.

The law is well established that the lower court cannot be in error so long as its action is in accordance with the mandate of the reviewing court. It was so held in Smith v. Luggar, 318 Ill. 215, 216, and the many cases cited therein:

"Where a decree is reversed and the cause is remanded with specific directions as to the action to be taken by the trial court it is the duty of that court to follow those directions, and a decree entered in accordance with such directions cannot be erroneous, however erroneous the directions may be. (Boggs v. Willard, 70 Ill. 315; Findett v. Muggles, 151 id. 184; Roby v. Calumet and Chicago Canal and Dock Co., 154 id. 190; Blackaby v. Blackaby, 189 id. 342; Noble v. Tipton, 222 id. 639; Kanterbach v. Studt, 240 id. 464; Trustees of Schools v. Hoyt, ante, p. 60.) Where a decree has been reversed and the cause remanded with specific directions for the entry of a decree, on an appeal from the decree so entered the only question presented is, Was the decree in accordance with the mandate and directions of this court? (Chicago Railway Equipment Co. v. National Mellow Brake-Band Co., 236 Ill.

111; People v. Day, 279 id. 148.) A decree entered by a trial court in accordance with the mandate of this court must be regarded as free from error. It is, in fact, the judgment of this court promulgated through the trial court and is final and conclusive upon all the parties. (People v. Gilmer, 5 Gilm. 242.)"

There is no merit in this appeal and it appears to us to be an attempt to relitigate a cause which was effectually and finally disposed of when the Supreme court denied defendant's petition for certiorari in the prior appeal. It was the duty of the trial court to enforce this decree and to see that its findings were made effective by all proper and available means. We are convinced that the trial court did not err in entering the order appealed from. For the reasons stated herein the order of the Superior court is affirmed.

AFFIRMED.

Scanlan, P. J., and Gridley, J., concur.

1911, People v. May, 174 Cal. 121. A decree rendered by a trial court in accordance with the findings of fact and conclusions of law reported as follows: "It is the finding of the court that the defendant is guilty of the crime charged in the indictment and is sentenced to the State Prison for a term of five years."

There is no error in this appeal and it appears to be an attempt to establish a cause which was not presented and finally disposed of when the judgment was denied. The position of the defendant in the trial court is not the same as the position of the defendant in the appeal. It was the duty of the trial court to render the decree and to see that the findings were made effective by all proper and available means. It was concluded that the trial court did not do so in making the order appealed from. For the reasons stated herein the order of the Superior Court is affirmed.

Reversed.

36730

NATHAN BROWN et al.,
Appellees,

v.

FOREMAN-STATE TRUST &
SAVINGS BANK et al.,
Defendants.

On appeal of FOREMAN-STATE
TRUST & SAVINGS BANK,
Appellant.

APPEAL FROM AN
INTERLOCUTORY ORDER OF
SUPERIOR COURT OF COOK
COUNTY, APPOINTING A
RECEIVER.

270 I.A. 631²

MR. JUSTICE SULLIVAN DELIVERED THE OPINION OF THE COURT.

The appellant prosecutes this interlocutory appeal from an order of the Superior court of Cook county appointing Frank C. Rathje receiver pendente lite of a certain trust estate. This order was entered January 18, 1933, the day after a decree was entered removing appellant as trustee and appointing Frank C. Rathje as successor trustee. The Foreman-State Trust & Savings Bank (hereinafter referred to as the bank) and other defendants appealed from this decree, thus staying the authority of Rathje to act as trustee and rendering necessary the appointment of a receiver pendente lite.

Some of the owners of first mortgage participation certificates in a trust created under an agreement of August 1, 1927, between A. C. Becker & Company, a corporation, and the Foreman Trust & Savings Bank (of which the Foreman-State Trust & Savings Bank is successor by consolidation), filed a bill of complaint January 18, 1932, in the Superior court and subsequently several amendments thereto in behalf of themselves and all other holders of participation certificates similarly situated, in which

NOTICE OF THE COURT OF COMMONS

IN THE COURT OF COMMONS

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The applicant prays that this indorsement be

from an order of the Registrar of the County of

Trinity, 1891, against the said of a certain

This writ was issued January 18, 1891, the day after a return

was entered removing applicant as trustee and appointing

as trustee of the said. The return was made

Bank (hereinafter referred to as the bank) and other

appealed from this decree, thus denying the authority of

as set on record and thereby making the appointment of a

trustee void.

One of the owners of the said mortgage

indorsement is a trust created under an agreement of

1887, between A. B. Beck & Company, a corporation, and the

Trinity Trust & Savings Bank (of which the Beckman-Beck

Savings Bank is now a member by consolidation), filed a bill of

complaint January 18, 1891, in the Superior Court and

several decrees thereon in behalf of themselves and all other

holders of participation certificates similarly affected, in which

they charged misconduct and malfeasance on the part of the bank as trustee and prayed for the removal of the trustee and an accounting of its conduct of the trust, the repayment to the trust of certain moneys, the appointment of a receiver pendente lite, the appointment of a new trustee and for other relief. A. G. Becker & Company, which was engaged in the investment business and a party to the trust indenture, and five members of a committee representing other holders of participation certificates were also named as parties defendant.

A final decree was entered January 17, 1933, which found among other things, that the defendant trustee was guilty of misconduct and malfeasance in its administration of the trust and ordered the removal of the trustee and the appointment of Frank C. Rathje as successor in trust. The decree ordered a reference to a master in chancery for an accounting and the court under the terms of the decree retained jurisdiction of the cause for all proper purposes. The bank and all the other defendants except the state auditor of public accounts, who had been made a party defendant in one of the amendments to the bill, perfected separate appeals from this decree which are now pending in this court.

It appears that the Auditor of Public Accounts of the State of Illinois had taken charge of the properties and assets of the bank January 6, 1933, and had appointed a receiver for it and that January 7, 1933, the circuit court upon proper petition confirmed the appointment of the auditor's receiver and from and after that date that receiver or the successor receiver (hereinafter referred to as the Circuit court receiver) appointed by the auditor and confirmed by the Circuit court January 24, 1933, has been continuously in possession and control of all of the property and assets of this trust estate and all other properties owned by the bank or held by it in trust.

they charged misconduct and malfeasance on the part of the bank
as trustee and prayed for the removal of the trustee and an
accounting of the conduct of the trust. The respondents to the trust
of certain money, the appointment of a receiver pursuant to the
appointment of a new trustee and for other relief. A. E. Becker &
Company, which was engaged in the investment business and a party
to the trust indenture, and five members of a committee representing
other holders of participation certificates were also named as
parties defendant.

A final decree was entered January 17, 1933, which found
among other things, that the defendant trustee was guilty of malfeasance and misfeasance in the administration of the trust and ordered
the removal of the trustee and the appointment of Frank E. Kneifel
as receiver in trust. The court entered a judgment to a master
in equity for an accounting and the court under the terms of the
decree retained jurisdiction of the cause for all proper purposes.
The bank and all the other defendants except the state auditor of
public accounts, who had been made a party defendant in one of the
complaints to the bill, petitioned separate appeals from this decree
which are now pending in this court.

It appears that the auditor of Public Accounts of the
State of Illinois had taken charge of the property and assets of
the bank January 6, 1933, and had appointed a receiver for it and
that January 7, 1933, the circuit court upon proper petition entered
the appointment of the auditor's receiver and from and after
that date that receiver or the successor receiver (hereinafter
referred to as the circuit court receiver) appointed by the auditor
and confirmed by the circuit court January 12, 1933, has been and
continues to be in possession and control of all of the property and assets
of this trust estate and all other properties owned by the bank or
held by it in trust.

January 18, 1933, the day after the entry of the decree in this case, the complainants filed a petition alleging that the bank and certain other defendants had perfected appeals from the decree; that January 6, 1933, the state auditor had taken possession of all of the property of the bank, including the property of this trust, under section 11 of the Illinois Banking Act and had appointed a receiver thereof; that the bank because of the action of the auditor in appointing a receiver had become incapable of performing its duties as trustee of the trust in question; and that such perfected appeals from the decree would act as a supersedeas and stay the authority of Frank C. Rathje to act as successor trustee during the pendency of the appeals. The petition concluded with the prayer that the court appoint a receiver pendente lite to take possession of the properties belonging to the trust, administer them pending the appeal, and hold them subject to the order of the Superior court until such appeal shall be finally determined. After the hearing on this petition the court appointed Frank C. Rathje receiver pendente lite of this trust.

The motion of the appellees to dismiss the appeal from the order appointing Rathje receiver pendente lite, - the ruling on which was reserved, - is denied, but the points urged for and against the motion have been considered in the determination of the issue presented by this appeal.

The bank contends that there was no legal justification for the appointment of a receiver pendente lite to take possession of the trust property after the entry of the final decree and that no such appointment was warranted except, because, and by reason of matters which occurred subsequent to the entry of the decree and that nothing did occur after the entry of the decree in this case that called for the appointment of a receiver; that there were no proper pleadings in the case upon which to base such an order;

January 12, 1933, the day after the entry of the decree
in this case, the complainant filed a petition alleging that the
bank and certain other defendants had converted assets from the
trust and January 12, 1933, the state auditor and other persons
of all of the property of the bank, including the property of this
trust, under section 11 of the Illinois Banking Act and had appointed
a receiver thereof; that the bank became of the action of the
petitioner in appointing a receiver had become incapable of performing
its duties as trustee of the trust in question; and that such per-
sonal assets from the assets would not be a unavoidable and that
the authority of Frank C. Smith is not an authorized trustee under
the provisions of the appeal. The petition concluded with the prayer
that the court appoint a receiver under the provisions
of the provisions belonging to the trust, administer them according
to the appeal, and hold them subject to the order of the Superior Court
which shall appear shall be finally determined. After the hearing
in this petition the court appointed Frank C. Smith receiver
under the provisions of this appeal.

The nature of the complaint is stated in the appeal and
the order appointing Smith receiver under the provisions of this appeal - the finding
on which was reversed, - is stated, but the point urged for and
against the motion have been mentioned in the determination of the
lower court of this appeal.

The bank contends that there was no legal justification
for the appointment of a receiver under the provisions of this appeal
of the trust property after the entry of the final decree and that
no such appointment was warranted except, perhaps, and by reason
of assets which remained subject to the entry of the decree and
that within six days after the entry of the decree in this case
there called for the appointment of a receiver that there were no
proper grounds in the case upon which to have such an order.

that at the time of the entry of the order appointing Frank C. Rathje, receiver, the property was in the possession of the court Circuit/receiver, and that the Circuit court receiver should have been made a party to the proceedings in the Superior court.

For a proper understanding and determination of the issue presented it is necessary to visualize the exact picture presented. In the first instance it appears that the bank, acting as trustee of this trust, was charged with malfeasance in the bill filed in the Superior court, and removed as trustee because of its alleged misconduct and malfeasance. It further appeared that A. G. Becker & Company, the other party to the trust indenture, was disqualified under the terms of the decree from appointing a successor trustee; that Frank C. Rathje was appointed successor trustee by the Superior court; that the bank and other defendants perfected appeals by reason of which Frank C. Rathje was precluded by operation of law from assuming his duties as successor trustee until the final determination of the appeals; that the bank, whose duty it was to continue as trustee pending its appeal, was unable to act as trustee because of the appointment of a receiver for it by the Circuit court, which receiver had been appointed and had been in possession of all of the assets and property of the bank, including the assets and property of this trust, since prior to the entry of the Superior court's decree and continuously since that time; that Frank C. Rathje was appointed receiver pendente lite of this trust by the Superior court, January 18, 1933; that the Circuit court receiver, whose duty it was under the law to cause the bank to resign as trustee within a reasonable time and to make proper accounting of the trust on behalf of the bank, refused to comply with the demand of Frank C. Rathje as such receiver pendente lite to turn over to him the property and assets of this trust and asserted claims, that if allowed would mean the

that at the time of the entry of the order appointing Frank B. Haight, receiver, the property was in the possession of the Circuit Court, and that the Circuit Court receiver should have been made a party to the proceedings in the Superior Court.

For a proper understanding and determination of the issue presented it is necessary to recite the facts as they presented. In the first instance it appears that the bank, acting as trustee of this trust, was charged with possession of the land in the Superior Court, and removed as trustee because of the alleged misconduct and misfeasance. It further appeared that

A. C. Becker & Company, the other party to the trust instrument, was designated under the terms of the decree from appointing a

trustee by the Superior Court; that Frank B. Haight was appointed trustee by the Superior Court; that the bank and other defendants petitioned appeals by reason of which Frank B. Haight was removed by question of law from assuming his duties as appointed trustee until the final determination of the appeal; that the bank, alone or

with as trustee because of the appointment of a receiver for it by the Circuit Court, which receiver had been appointed and had taken possession of all of the assets and property of the bank, was claiming the assets and property of this trust, since prior to the entry of the Superior Court's decree had continuously since that time that Frank B. Haight was appointed receiver under the

of this trust by the Superior Court, January 10, 1901; that the Circuit Court receiver, whose duty it was under the law to cause the bank to transfer its assets within a reasonable time and in said proper execution of the trust on behalf of the bank, refused to comply with the decree of Frank B. Haight as such receiver under the law to turn over to him the property and assets of this trust and transfer same, and it allowed would have the

serious diminution of same and that are inimical to the interests of those holding the \$6,000,000 first mortgage participation certificates in this trust.

February 24, 1933, Frank C. Rathje filed an intervening petition in the dissolution proceedings against the bank pending in the Circuit court, in which he asked that Charles H. Albers, the receiver of the bank, be ordered to turn over to Rathje all of the property and assets of this trust. Albers filed an answer to this petition contesting the right of Rathje to the possession and control of the property and assets of the trust and included in the allegations of his answer are the following:

"The complainants and intervening petitioners (in the Superior court proceedings) and the holders of certificates issued against the said securities which are part of said trust estates have by the institution and prosecution of said suit (in the Superior court) elected to repudiate and not to accept such securities so purchased by said Trustee and have elected to obtain a money judgment against said trustee for the amount thereof, and by reason thereof the said assets so rejected are general assets of the Foreman-State Trust & Savings Bank not earmarked for any specific purpose and as such are subject only to the orders of this court. In the order appointing said Rathje as Receiver pendente lite, no distinction is made between assets found by the decree of the Superior court to be properly assets of said trust estates and securities found not to belong to said trust estates, and in that portion of said order appointing said Receiver pendente lite and directing all persons having assets belonging to said trust estates to deliver same over to said Receiver, no distinction is made between such accepted and rejected assets.

"Your respondent further avers that the fair proportion of the estimated costs of this receivership, which the said trust estates created by and existing under said indenture of trust, (the trust involved in this proceeding) based upon the estimated present value of the said trust estates, is not less than the sum of \$90,000. * * "

It is clearly indicated by the foregoing that it was the intention of Albers as general receiver of the bank to charge this trust, which at the time was under his control and management, with large sums of money in favor of the bank and to compel the trust to turn over its property and pay its money in large amounts to him as receiver of the bank. This would mean a serious depletion of the assets of the trust. The statute provides that the bank

receiver must cause the bank to resign from its trustee within a reasonable time and it is folly to argue that it should be permitted to administer the affairs of this trust indefinitely or until the final determination of the appeals. Such a course of procedure by a bank receiver was not only not contemplated under the law but it is prohibited by the banking act itself. Under the circumstances of the case at bar it would be incompatible for the bank receiver with his claims against this trust to continue in charge of its affairs. It is apparent that his interest as receiver for the bank and his interest in the administration of this particular trust conflict. The beneficiaries of this trust, who are the owners of the participation certificates, have the right to insist that the affairs and property of the trust be administered exclusively in their interest.

Albers also avers in his answer that it was not legally contemplated that he as the bank's receiver should turn over and account for the assets of this trust to any but a properly designated successor in trust, and inasmuch as the right and power of Frank J. Rathje to act under the decree of the Superior court designating and appointing him successor trustee has been stayed by reason of the bank's appeal from that decree, and because the bank whose duty it would have been to continue to act as trustee pending the appeal can not act, because its power to act as trustee has been taken from it by the decree of the Circuit court ordering its dissolution and the appointment of a receiver for it, that he as such bank receiver is the only proper person to administer this trust pending the final determination of the appeal from the decree of the Superior court. The statute does not provide that after the resignation by the bank as trustee the property and assets of the resigned trust must necessarily be turned over to a successor

the receiver must obtain the bank's assent to receive from the trustee within a reasonable time and it is held to argue that it should be permitted to administer the affairs of the trust intelligently or not at the final determination of the executor. When a course of procedure by a bank receiver was not only not contemplated under the law but it is prohibited by the banking act itself. Under the circumstances of the case as now it would be inadvisable for the bank receiver with his claims against this trust to continue in charge of the affairs. It is apparent that his interest as receiver for the bank and his interest in the administration of this particular trust conflict. The beneficiaries of this trust who are the owners of the participation certificates, have the right to insist that the affairs and property of the trust be administered exclusively in their interests.

There is also a point in his answer that it was not legally contemplated that he as the bank's receiver should have any authority over the assets of this trust to act as a receiver. The answer is that in equity and in conscience at the time and place of March 2, 1914, he was under the duties of the executor court in administering and settling the business of the bank and because the bank was then in a position to continue to act as trustee and receiver and it would have been as certain as that the receiver was not, because the bank so act as trustee and receiver taken from it by the decree of the circuit court entered in the administration and the appointment of a receiver for it, that he as such bank receiver is the only proper person to administer this trust pending the final determination of the appeal from the decree of the executor court. The statute does not provide that after the participation by the bank as trustee the property was to be administered by the bank and consequently he cannot ever be a receiver.

trustee, and in this case where circumstances had arisen that rendered it impossible to turn such assets over to any trustee, and where the facts and circumstances demonstrate that the bank receiver is disqualified from administering the affairs of this trust, we are forced to the conclusion that the Circuit court receiver should as soon as he reasonably can deliver the property and assets of this trust to Rathje, the receiver pendente lite appointed by the Superior court, who is the only person under this record equitably entitled to have and control them.

Upon the filing of the bill in the Superior court about a year before the Auditor of Public Accounts of the State of Illinois took charge of the property and assets of the bank and named a receiver for it, that court had and assumed jurisdiction of the subject matter of this trust estate and in due course ordered the removal of the bank as trustee and appointed Rathje as successor trustee, and since he was precluded from functioning as trustee because of the appeals it was the duty of that court to exercise its power by any means available to conserve the property and assets of the trust in the interest of its beneficiaries exclusively. This it properly did by appointing Frank C. Rathje to act as receiver pendente lite pending the final determination of the main appeal in this case.

The bank devoted most of its reply brief to the contention that, notwithstanding the appointment of the receiver for the bank, the bank was not deprived of its capacity to continue to act as trustee, and that while the receiver superseded the officers and directors of the bank in the administration of its affairs the Circuit court receiver could, through the instrumentality of the bank as trustee, continue administering the affairs of this trust as a trustee.

This argument is fallacious and is clearly an erroneous statement of the law. Section 1 of the Illinois State Banking

frustrated, and in this case where circumstances had arisen that rendered it impossible to turn such assets over to any creditor, and that the bank and its officers had no knowledge of this receiver is disappointed from administering the affairs of this bank, as was stated in the commission report the receiver should be given the right to be heard on the matter.

and assets of this bank to be held, the receiver was appointed by the superior court, who is the only person under this second judicially entitled to have and control them.

Upon the filing of the bill in the superior court about a year before the failure of the bank, the receiver was appointed by the court as receiver of the property and assets of the bank and Illinois took charge of the property and assets of the bank and named a receiver Jan 15, 1893 court had and assumed jurisdiction of the subject matter of this first order and in due course ordered the receiver of the bank on grounds and appointed receiver as successor trustee, and since he was provided from functioning as trustee because of the expense it was the duty of that court to exercise its power by any means available to conserve the property and assets of the bank in the interest of its beneficiaries exclusive-

ly. This is properly did by appointing Frank C. Nichols to act as receiver and assets of the bank pending the final determination of the matter appeal in this case.

The bank stopped work of its bank prior to the appointment of the receiver and the appointment of the receiver was made by the court and the bank was not allowed to do business as receiver so that the receiver was not allowed to do business as receiver and the receiver was not allowed to do business as receiver and the receiver was not allowed to do business as receiver.

and that while the receiver was appointed the officers and directors of the bank in the administration of its affairs the receiver was not allowed to do business as receiver and the receiver was not allowed to do business as receiver and the receiver was not allowed to do business as receiver.

This receiver is appointed by the court and is entitled to exercise the powers of the bank and is entitled to exercise the powers of the bank and is entitled to exercise the powers of the bank and is entitled to exercise the powers of the bank.

Law provides:

"It shall be lawful to form banks and banking associations, as hereinafter provided, for the purpose of discount and deposit, buying and selling exchange and doing a general banking business, excepting the issuing of bills to circulate as money; and such banks or banking associations shall have the power to loan money on personal and real estate security, and to accept and execute trusts, and shall be subject to all of the provisions of this Act."

Its right to accept and execute trusts was one of its functions as a bank, in no greater nor less degree than its right and power to lend money, accept deposits or perform any of its other authorized functions. Its power and right to function in any capacity as a bank terminated on the appointment of the receiver for it and the entry of the decree of dissolution by the Circuit court, which found in part as follows:

"Thereupon said Receiver, pursuant to said appointment and under the authority and by the direction of said Auditor of Public Accounts, has taken possession of the books, records and assets of every description of said bank and is now proceeding to collect all the debts, dues and claims belonging to said defendant bank at the time of his appointment as such Receiver, and said Receiver is now performing the duties incident to such receivership, as required by the laws of the State of Illinois in such cases made and provided, and that the authority of such defendant bank to conduct a banking business under the statutes of the State of Illinois has ceased and determined."

Even were the main decree reversed the appellant could no longer function as trustee of this trust and we can conceive of no interest of the appellant that was or could be adversely affected by reason of the appointment of Frank C. Rathje as receiver pendente lite by the Superior court. However, in order to consider the merits of the issues presented, we have assumed that the bank had such an appealable interest in the subject matter of this proceeding as gave it the right to appeal.

Complaint is made that ~~James O. Albers~~ Albers, the general receiver of the bank who was in possession and control of the property of the trust at the time the decree was entered in the Superior court and the receiver appointed pendente lite, was not made a party to the proceedings in the Superior court. That suit

had been instituted nearly a year prior to the appointment of the receiver by the Circuit court, and the state auditor of public accounts who originally appointed Albers was a party defendant therein and had notice of that proceeding. The Circuit court receiver was not a necessary party to that suit but there is no question about his right to have intervened therein for the purpose of being made a party any time after his appointment if he had seen fit to do so.

There is no force to the contention of the bank that the action of the Superior court in appointing a receiver pendente lite after the entry of the final decree was unwarranted and in any event such appointment should not have been made unless proper pleadings were filed alleging matters that occurred subsequent to the entry of the decree that justified such action. Frank C. Rathje was appointed receiver pendente lite the day after the entry of the final decree upon a petition that included by reference the pleadings theretofore filed in the case. This petition alleged that the Circuit court receiver was in possession of the bank's property, including the property of this trust; that Rathje was unable to act as trustee because of the appeals from the decree and that it was necessary that a receiver be appointed, pending the determination of the appeals from the final decree, to conserve the property and assets of this trust.

We have been unable to discover any decision in this or any other state, or any law enunciated in the text books prohibiting the appointment of a receiver after a final decree, if the facts and circumstances are such as to warrant such action. In the instant case the circumstances were such that it was not only proper but positively necessary that the chancellor, bent on conserving the property of this trust solely in the interests of its beneficiaries, make such appointment. By reason of the subsequent conduct of Albers, the

had been instituted nearly a year prior to the appointment of the
receiver by the Circuit Court, and the state auditor of public
accounts in relation to the appointment of the receiver
therein and had notice of said proceedings. The Circuit Court
receiver was not a necessary party to this suit and there is
no question about his right to have interested parties to the
purpose of being made a party and after his appointment it
is his duty to do so.

There is no issue as to the constitution of the bank since
the action of the Superior Court in appointing a receiver provisio
1892 after the entry of the final decree was announced and in
not even such appointment should not have been made unless proper
proceedings were first taken against the bank and subsequent to
the entry of the decree that facilitated such action. There is
no issue as to the constitution of the bank since the entry of the
final decree upon a petition that included by reference
the petition thereto filed in the case. This petition alleged
that the Circuit Court receiver was in possession of the bank's
property, including the property of this trust that should not
be able to not be passed because of the appeals from the decree
and that it was necessary that a receiver be appointed, pending
the determination of the appeals from the final decree, to preserve
the property and assets of this trust.

We have been unable to discover any objection in this or any
other matter, or any law mentioned in the two bills filed in the
appointment of a receiver after a final decree, if the facts are as
mentioned in the bills as in relation to the action. In the United States
the circumstances were such that it was not only proper but justifiably
necessary that the appellants, had we considered the propriety of this
trust solely in the interests of the beneficiaries, make such appoint-
ment. By reason of the subsequent conduct of the appellants, the

Circuit court receiver, in asserting claims in his answer to the intervening petition in derogation of the interests of the trust estate, it was even more apparent that the chancellor of the Superior court ordered not only correctly, but wisely, in his appointment of a receiver pendente lite.

It was manifestly necessary that some one especially charged under the direction of the court with the conservation of this estate have its possession and custody to guard and protect it against any and every unwarranted claim or attack. It would be anomalous and inconsistent to permit the Circuit court receiver to control and represent both the bank and this trust against which he has asserted extensive claims in favor of himself as receiver of the bank. The only person legally empowered to receive the property and assets of this trust from the Circuit court receiver was and is Frank C. Rathje, receiver pendente lite appointed by the Superior court.

The bank cites the case of Belofsky v. Johnson, 266 Ill. App. 351, and urges that the opinion therein is decisive of the issue presented by this appeal. That case is readily distinguishable from the case at bar. The facts were entirely different and no such combination of circumstances existed there as here.

For the reasons stated it is our opinion that the chancellor was justified in appointing a receiver pendente lite under all the circumstances disclosed, and the order of the Superior court appointing such receiver pendente lite is affirmed.

AFFIRMED.

Scanlan, P. J., and Gridley, J., concur.

plaintiff's right to recover, inasmuch as the plaintiff is the owner of the property in question and the defendant is the possessor of the same, it is not even necessary to consider the question of the

plaintiff's right to recover, but simply to consider the question of the

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36227

EDWARD V. CORFF,

Plaintiff, Appellee,

v.

ADAMS & RAGAN MANUFACTURING COMPANY,
a corporation, METROPOLITAN FINANCE
CORPORATION, a corporation, and
CHARLES E. OSBORNE,

Defendant, Appellants.

APPEAL FROM

MUNICIPAL COURT

COOK COUNTY.

270 I.A. 631³

Opinion filed May 24, 1933

MR. PRESIDING JUSTICE WILSON DELIVERED THE OPINION OF THE COURT.

This was an action in replevin in the Municipal Court to recover certain property of plaintiff under a chattel mortgage issued by the defendant Adams & Ragan Manufacturing Company to one Stanley F. Ragan and by him assigned to the plaintiff. The action was subsequently changed to one of trover. The mortgage became due under its terms and the plaintiff gave Adams & Ragan Manufacturing Company notice of foreclosure and placed a custodian in charge. The property was taken by the Metropolitan Finance Corporation relying on a subsequent chattel mortgage made and executed by Mathew Adamaitis.

It is insisted on behalf of the defendants:

(a) That the chattel mortgage of plaintiff was not properly executed;

(b) That the board of directors did not authorize the execution of the chattel mortgage to the plaintiff and that Mathew Adamaitis had no authority to execute it;

(c) That the holder of the chattel mortgage did not show that he was entitled to the property;

(d) That there was no demand on the defendants; and

(e) That the Metropolitan Finance Corporation, an Illinois corporation, was never in possession of the property.

From the evidence we are of the opinion that the plaintiff

CHAS. E. BROWN

PLAINTIFF, vs. DEFENDANT

v.

CHAS. E. BROWN & SONS, INCORPORATED, vs. CHAS. E. BROWN & SONS, INCORPORATED

Defendant, vs. Plaintiff

270 I.A. 631

Opinion filed May 24, 1933

MR. JUSTICE LUTHER WILSON delivered the opinion of the court.

This was an action in replevin in the Municipal Court to recover certain property of plaintiff under a chattel mortgage issued by the defendant Adams & Hagan Manufacturing Company to one Stanley T. Hagan and by him assigned to the plaintiff. The action was substantially brought to one of two. The mortgage became due under its terms and the plaintiff gave Adams & Hagan Manufacturing Company notice of foreclosure and placed a trustee in charge. The property was taken by the Metropolitan Finance Corporation upon a subsequent chattel mortgage made and executed by Stanley Adams.

- It is insisted on behalf of the defendant:
- (a) That the chattel mortgage of plaintiff was not properly assigned;
 - (b) That the board of directors did not authorize the execution of the chattel mortgage to the plaintiff and that neither Adams had no authority to execute it;
 - (c) That the holder of the chattel mortgage did not show that he was entitled to the property;
 - (d) That there was no demand on the defendant; and
 - (e) That the Metropolitan Finance Corporation, an Illinois corporation, was never in possession of the property.
- From the evidence we are of the opinion that the plaintiff

was induced to lend the corporation money on the assumption that the note and mortgage executed by the corporation and held as such, was, in fact, the note of the corporation. The defendants had knowledge of the existence of the chattel mortgage and should not be permitted to question the irregularity of its existence as this right belonged to the corporation. Darst v. Dale, et al, 83 Ill. 136; Magerstadt v. First National Bank of Chicago, 175 Ill. App. 407. The evidence bears out the position of the trial court in that the defendants had taken possession of the property although denying such in their answer. Under the circumstances the possession of the defendants was tortious. The trial court found and we find no reason to question its finding that the plaintiff was entitled to the possession of the property under his chattel mortgage and, upon failure to recover same, was entitled to damages for its conversion.

The question as to whether or not the Metropolitan Finance Corporation was in possession of the property was a question of fact for the court. The cause was tried without a jury and every intendment will be indulged in favor of the finding of the trial court.

Adamaitis, who is the Adams of the Adams & Bagan Manufacturing Company, testified that the property covered by plaintiff's mortgage was the property of the corporation, even though he, himself, executed a subsequent chattel mortgage to the Metropolitan Finance Corporation.

One Bloom, called as a witness for the defendants, testified that he went into possession of the premises in which the property is located on or about October 23, 1930, presumably on behalf of the Metropolitan Finance Corporation. Counsel for defendants admit that the Metropolitan Credit & Discount Corporation was a successor to the defendant, Metropolitan Finance Corporation and there was evidence in the record sufficient to bear out this finding.

was induced to lend the corporation money on the assumption that the note and mortgage executed by the corporation and held as such, was, in fact, the note of the corporation. The defendants had knowledge of the existence of the chattel mortgage and should not be permitted to question the irregularity of its execution as this right belonged to the corporation. First National Bank of Chicago v. Chicago & North Western Ry. Co.

There is no question but that the defendants had taken possession of the property although denying such in their answer. Under the circumstances the possession of the defendants was tortious. The trial court found and we find no reason to question its finding that the plaintiff was entitled to the possession of the property under his chattel mortgage and, upon failure to answer same, was entitled to damages for its conversion.

The question as to whether or not the Metropolitan Finance Corporation was in possession of the property was a question of fact for the court. The cause was tried without a jury and every inference must be indulged in favor of the finding of the trial court. Adams v. Adams & Rogers Lumber Co.

Wing Company, testified that the property covered by plaintiff's mortgage was the property of the corporation, even though he, plaintiff, executed a subsequent chattel mortgage to the Metropolitan Finance Corporation.

One Dixon, called as a witness for the defendants, testified that he went into possession of the premises in which the property is located on or about October 23, 1920, presumably on behalf of the Metropolitan Finance Corporation. Counsel for defendants admit that the Metropolitan Credit & Discount Corporation was a successor to the defendant, Metropolitan Finance Corporation and there was evidence in the record sufficient to bear out this finding.

Osborne testified that he had purchased this machinery, evidently under the sale by the defendant Metropolitan Finance Corporation.

The trial court saw the witnesses, heard the testimony and was in a better position to pass upon the evidence than is this court.

We see no reason for disturbing the judgment of the trial court and therefore the judgment of the Municipal Court is affirmed.

JUDGMENT AFFIRMED.

HEBEL AND HALL, JJ. CONCUR.

... ..

1. The trial court was the witness, being the receiving end of the evidence, and the witness was the witness, being the receiving end of the evidence.

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36236

CRANE CO., a corporation,
Appellant,

v.

FRANK S. HAGLUND,
Appellee.

APPEAL FROM

MUNICIPAL COURT

OF CHICAGO.

270 I.A. 631⁴

Opinion filed May 24, 1933

MR. PRESIDING JUSTICE WILSON DELIVERED THE OPINION OF THE COURT.

This was an action of the fourth class in tort to recover for property damage to plaintiff's Chevrolet coupe amounting to \$140.73. The cause was submitted to the court without a jury, resulting in a finding in favor of the defendant and judgment was entered upon the finding.

Plaintiff was traveling in a southwesterly direction on Ogden avenue approaching Maple avenue, an intersecting highway, about 1 P. M. on April 7, 1930. Defendant was driving in a northeasterly direction on the same highway and at the intersection of Ogden and Maple avenues he made a left hand turn in front of plaintiff's approaching car. Plaintiff claims that the car of the defendant started to cross sharply and quickly and that the accident was caused by defendant's negligence. Defendant claims that when he started to turn plaintiff's car was about 150 feet away and that he, the defendant, was in the exercise of due care and that plaintiff was guilty of negligence.

The evidence was conflicting. The court saw and heard the witnesses and we will not reverse the judgment on the facts unless this court is able to say that the finding of the trial court is manifestly against the weight of the evidence. This we are unable to do.

STATE OF TEXAS, a corporation,

Appellant,

VERSUS

Appellee.

Opinion filed May 24, 1933

MR. JUSTICE WILSON delivered the opinion of the court. This was an action of the fourth class in tort to recover for property damage to plaintiff's Chevrolet coupe amounting to \$140.75. The cause was submitted to the jury without a jury. Resulting in a finding in favor of the defendant and judgment was entered upon the finding.

Plaintiff was traveling in a southeasterly direction on Ogden Avenue approaching Maple Avenue, an intersecting highway, about 1 P. M. on April 7, 1930. Defendant was driving in a northeasterly direction on the same highway and at the intersection of Ogden and Maple Avenue he made a left hand turn in front of plaintiff's approaching car. Plaintiff claims that the car of the defendant started to cross sharply and quickly and that the accident was caused by defendant's negligence. Defendant claims that when he started to turn plaintiff's car was about 150 feet away and that he, the defendant, was in the exercise of due care and that plaintiff was guilty of negligence.

The evidence was conflicting. The court saw and heard the witnesses and we will not reverse the judgment on the facts unless this court is able to say that the finding of the trial court is manifestly against the weight of the evidence. This we are unable to do.

While the statute gives the right of way to motor vehicles approaching from the opposite direction over those attempting to make a turn at intersecting highways, nevertheless, we assume that the court was familiar with this statute and had it in mind at the time it made its finding.

There being no reason for disturbing the finding and judgment of the trial court, it is therefore ordered that the judgment of the Municipal Court be and it hereby is affirmed.

JUDGMENT AFFIRMED.

HEBEL AND HALL, JJ. CONCUR.

While for instance there are eight or nine

various countries from the Spanish division over their

log to make a man of interesting highway, nevertheless,

regard that the court was familiar with this subject and had

in mind at the time it made the finding.

There being no reason for doubting the finding and

judgment of the trial court, it is therefore ordered that the

judgment of the municipal court be and it hereby is affirmed.

THE COURT OF APPEALS OF THE STATE OF CALIFORNIA

IN SENATE, AT SAN FRANCISCO, THIS 10TH DAY OF JANUARY, 1909.

THE COURT OF APPEALS OF THE STATE OF CALIFORNIA

IN SENATE, AT SAN FRANCISCO, THIS 10TH DAY OF JANUARY, 1909.

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THE COURT OF APPEALS OF THE STATE OF CALIFORNIA

IN SENATE, AT SAN FRANCISCO, THIS 10TH DAY OF JANUARY, 1909.

36245

CLIFFORD J. BATES,

(Plaintiff) Appellee,

v.

COUNTY OF COOK,

(Defendant) Appellant.

APPEAL FROM

CIRCUIT COURT,

COOK COUNTY.

270 I.A. 631⁵

Opinion filed May 24, 1933

MR. PRESIDING JUSTICE WILSON DELIVERED THE OPINION OF THE COURT.

This was an action in assumpsit by the plaintiff to recover salary claimed to be due him while acting as an assistant state's attorney from July 1st, 1924 to December 1st, 1924, and April 15, 1925 to December 16, 1925. The original action was in mandamus but was amended to assumpsit by leave of court. A summons issued against Anton J. Cermak, President of the Board of County Commissioners of Cook County. A demurrer to the original mandamus proceeding was filed by the County of Cook, a municipal corporation, and Anton J. Cermak, President of the Board of County Commissioners, by their attorneys. To the declaration in assumpsit subsequently filed, the defendant filed first a plea of nonassumpsit and second that the action had not accrued at any time within five years next preceeding the commencement of the action. The last services claimed to have been performed by plaintiff were December 16, 1925. This action was commenced June 2, 1932. No point is made as to the statute of limitations pleaded by the defendants, and, consequently, will not be considered.

Evidence was heard by the trial court as to the services performed by the plaintiff as an assistant state's attorney during the time that plaintiff claims he performed services for the state's attorney of Cook County and there is evidence pro and con as to whether or not he continued to work for the state's attorney without pay on the promise that he would be taken care of out of the next

WILLIAM J. BAKER

(Plaintiff) Appellee

v.

COUNTY OF COOK

(Defendant) Appellant

COOK COUNTY

CIRCUIT COURT

WILLIAM J. BAKER

2701A.681

Opinion filed May 24, 1933

MR. PRESIDING JUSTICE WILSON DELIVERED THE OPINION OF THE COURT.

This was an action in replevin by the plaintiff to recover salary claimed to be due him while acting as an assistant state's attorney from July 1st, 1934 to December 1st, 1934, and April 1st, 1935 to December 1st, 1935. The original action was in replevin but was amended to replevin by leave of court. A summons issued against Anton J. Gernak, President of the Board of County Commissioners of Cook County, a defendant to the original replevin proceeding was filed by the County of Cook, a municipal corporation, and Anton J. Gernak, President of the Board of County Commissioners, by their attorneys. To the declaration in replevin subsequently filed, the defendant filed first a plea of nonassessable and second that the action had not accrued at any time within five years next preceding the commencement of the action. The last answer claimed to have been performed by plaintiff were December 1st, 1933. This action was commenced June 2, 1933. No point is made as to the statute of limitations pleaded by the defendant, and, consequently, will not be considered.

Evidence was heard by the trial court as to the services performed by the plaintiff as an assistant state's attorney during the time that plaintiff claims he performed services for the state's attorney of Cook County and there is evidence pro and con as to whether or not he continued to work for the state's attorney without pay on the promise that he would be taken care of out of the next

budget passed by the County Board. The judgment in the case runs against "The Board of Commissioners of Cook County." There is nothing in the evidence upon which a judgment against the members of the Board of County Commissioners, as members, or the Board of County Commissioners as a body could be predicated. If a judgment should be obtained by the plaintiff for services claimed to have been rendered, it should be against "Cook County". Paragraph 22 of Counties Act, Cahill's Illinois Revised Statutes, provides that counties "shall be a body politic and corporate, by the name and style of 'The county of _____,' and by that name may sue and be sued * * *." The liability, if any, in this case was against the County of Cook. Winnebago County v. Industrial Commission, et al., 336 Ill. 466.

Plaintiff moved for leave to file cross error in this court and this leave was granted and cross error filed. This cross error is supported by an affidavit of plaintiff to the effect that "The judgment as entered by the Clerk does not conform to the judgment as rendered by the court, in that as entered it purports to be against the board of commissioners of Cook County, whereas the judgment was in fact rendered against the defendant The County of Cook." The judgment before us is against the Board of Commissioners of Cook County and imports verity. It can not be attacked in this court by an affidavit. The fact that Cook County may have entered an appearance and become a party to the proceeding does not alter the fact that the judgment is against the Board of Commissioners and this judgment can not be affirmed by this court because there is no evidence in the record holding that body liable.

For the reasons stated in this opinion the judgment of the Circuit Court is reversed and the cause is remanded for a new trial.

JUDGMENT REVERSED AND CAUSE REMANDED.

HEBEL AND HALL, JJ. CONCUR.

judgment passed by the County Board. The judgment in the case was
against "the Board of Commissioners of Cook County." There is
nothing in the evidence upon which a judgment against the members
of the Board of County Commissioners, as members, or the Board of
County Commissioners as a body could be rendered. If a judgment
should be obtained by the Plaintiff for damages claimed to have
been rendered, it should be against "Cook County." It is not
at variance with public policy to render a judgment against a
committee "shall be a body politic and corporate, by the name and
style of 'The County of _____,' and by that name may sue and
be sued * * *." The liability, it may, in this case was against
the County of Cook. Windsor Smith v. Industrial Commission, 11
Ill. 2d 400.

Plaintiff moved for leave to file cross error in this
court and this leave was granted and cross error filed. This cross
error is supported by an affidavit of Plaintiff to the effect
that "The judgment as entered by the Clerk does not conform to the
judgment as rendered by the court, in that as entered it appears to
be against the Board of Commissioners of Cook County, whereas the
judgment was in fact rendered against the members of the Board of
County Commissioners. The judgment before us is against the Board of Commissioners
of Cook County and appears verily. It can not be attacked in this
court by an affidavit. The fact that Cook County may have entered an
appearance and become a party to the proceeding does not alter the
fact that the judgment is against the Board of Commissioners and
this judgment can not be affirmed by this court because there is
no evidence in the record holding that body liable.

For the reasons stated in this opinion the judgment of
the Circuit Court is reversed and the cause is remanded for a new

36255

MAE McPHILLIPS,

Plaintiff - Appellee,

v.

ARMOUR & COMPANY, a corporation,

Defendant - Appellant.

APPEAL FROM

SUPERIOR COURT,

COCK COUNTY.

270 I.A. 6321

Opinion filed May 24, 1933

MR. PRESIDING JUSTICE WILSON DELIVERED THE OPINION OF THE COURT.

Plaintiff brought her action to recover for personal injuries sustained by reason of a collision between a car in which she was riding as a passenger and a truck of the defendant. The accident happened in the forenoon of August 2, 1930, at the intersection of 80th and Honore streets, two intersecting streets in the city of Chicago. The jury returned a verdict in favor of the plaintiff for \$3,500 and judgment was entered on the verdict and from this judgment an appeal was taken to this court.

From the facts it appears that the car in which plaintiff was riding was a Ford sedan traveling north on Honore street. The truck of the defendant was traveling west on 80th street.

The driver of the Ford car testified that when he was within 25 feet of 80th street he looked to the right and noticed the truck coming and that it appeared to be 100 to 125 feet away; that at the time the Ford was traveling about 15 or 18 miles an hour; that when he was about on the intersection of the two streets, the truck appeared to be about 20 feet away; that as he proceeded on his way the truck hit the Ford, which he was driving, about the mid-section.

The driver of the truck testified that as he approached Honore street he stopped about 15 feet east of the east curb and looked to the left and to the right and could see no traffic coming north; that the truck again started and was proceeding at the rate of about 10 or 12 miles an hour when he, the driver of the truck,

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Opinion filed May 24, 1933

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Plaintiff brought her action to recover for personal

injuries sustained by reason of a collision between a car in which

she was riding as a passenger and a truck of the defendant. The

accident happened in the forenoon of August 2, 1930, at the inter-

section of 30th and Kansas streets, the intersection of the

city of Chicago. The jury returned a verdict in favor of the plaintiff

for \$5,800 and judgment was entered on the verdict and from this

judgment an appeal was taken to this court.

From the facts it appears that the car in which plaintiff

was riding was a Ford sedan traveling north on Kansas street. The

driver of the defendant was traveling west on 30th street.

The driver of the Ford car testified that when he was within

25 feet of 30th street he looked to the right and noticed the truck

coming and that it appeared to be 100 to 125 feet away; that at the

time the Ford was traveling about 15 or 18 miles an hour; that when

he was about on the intersection of the two streets, the truck

appeared to be about 20 feet away; that as he proceeded on his way

the truck hit the Ford, which he was driving, about the mid-section.

The driver of the truck testified that as he approached

Kansas street he stopped about 15 feet east of the east curb and

looked to the left and to the right and could not see anything coming

except that the Ford came across and was proceeding at the time

it struck it on 12 miles an hour when he, the driver of the Ford,

saw the Ford automobile about 3 feet away from him; that he applied the brakes and that the truck stopped within 3 feet.

Plaintiff testified that she was riding in the front seat on the right hand side of the driver, and as the Ford approached 80th street it was going about 15 miles an hour and that another car passed the Ford going in the same direction, 20 or 30 feet south of the intersection; that at this point she looked east on 80th street and saw a truck approaching which appeared to be 75 feet away. As a result of the collision she was rendered unconscious; that after the accident she was taken to the Auburn Park Hospital, where she remained for 3 days with ice bags on her head, and from there she was taken to her home.

The attending physician testified that plaintiff had sustained a skull fracture extending from the lower portion of the temporal bone down into the base of the head and upwards for about four inches and then divided into a "Y" shaped fracture; that he treated her for approximately $3\frac{1}{2}$ or 4 months and that she complained of headaches and dizziness and was not clear in her reasoning or thinking.

Defendant claims that, under the statute, the truck had the right of way and that the plaintiff, although a passenger, should have seen the approaching truck and should have warned the driver of the Ford car.

The court, on behalf of the defendant, instructed the jury to the effect that motor vehicles traveling upon public highways shall give the right of way to vehicles approaching along intersecting highways from the right. By this instruction the jury was fully apprised of the right of the defendant under the Motor Law of this state. While the statute gives the right of way under such circumstances to vehicles approaching along intersecting highways from the right, over those approaching from the left, it does not,

saw the Ford automobile about 5 feet away from him; that he applied the brakes and that the truck stopped within 5 feet.

Witness testified that she was riding in the front seat on the right hand side of the driver, and as the Ford approached 50th street it was going about 15 miles an hour and that another car passed the Ford going in the same direction, 30 or 35 feet north of the intersection; that at this point she looked east on 50th street and saw a truck approaching which appeared to be 15 feet away. As a result of the collision she was rendered unconscious; that after the accident she was taken to the Lincoln Park Hospital, where she remained for 3 days with ice bags on her head, and from there she was taken to her home.

The attending physician testified that Plaintiff had sustained a skull fracture extending from the lower portion of the temporal bone down into the base of the head and upwards for about four inches and then divided into a "Y" shaped fracture; that he removed her for approximately 1/2 of a minute and that she remained at Lincoln Park Hospital and did not leave in her condition of thinking.

Defendant claims that, under the statute, the truck had the right of way and that the Plaintiff, although a passenger, should have seen the approaching truck and should have warned the driver of the Ford car.

The court, on behalf of the defendant, instructed the jury to the effect that motor vehicles traveling upon public highways shall give the right of way to vehicles approaching along intersecting highways from the right. By this instruction the jury was fully apprised of the right of the defendant under the Motor Law of this state. While the statute gives the right of way under such circumstances to vehicles approaching along intersecting highways from the right, over those approaching from the left, it does not

as a matter of law, give the driver of such a vehicle the right to proceed regardless of the rights of others who have already reached the street intersection. Salmon v. Wilson, 227 Ill. App. 266; Heidler Co. v. Wilson & Bennett Co., 243 Ill. App. 89.

It was still a question of fact for the jury, under all the circumstances, as to whether or not the driver of the defendant's truck was guilty of negligence in the operation of the truck regardless of the statutory rights conferred upon him under the section of the Motor Vehicle Act to which we have already referred.

Complaint is made that the court erred in giving plaintiff's instruction number 5. This instruction authorized the jury to consider future pain or suffering on behalf of the plaintiff in arriving at the amount of damages, if any, sustained by her. The instruction is not subject to the criticism made. There was some evidence that she would continue to suffer from headaches, and the instruction itself limited the consideration of the jury to such future suffering and loss of health, if any.

The injury was a severe one and we do not consider the verdict excessive.

For the reasons stated in this opinion the judgment of the Superior Court is affirmed.

JUDGMENT AFFIRMED.

HEBEL AND WALL, J.J. CONCUR.

as a matter of law, give the driver of such a vehicle the right to proceed regardless of the rights of others who have already reached the street intersection. Williams v. Williams, 207 Ill. App.

207, 211 Ill. App. 2d, 134 N.E.2d 881.

It was still a question of fact for the jury, under all the circumstances, as to whether or not the driver of the defendant's truck was guilty of negligence in the operation of the truck regarding the of the statutory rights conferred upon him under the section of the Motor Vehicle Act to which we have already referred.

Complaint is made that the court erred in giving plaintiff's instruction number 8. This instruction authorized the jury to consider future pain or suffering on behalf of the plaintiff in arriving at the amount of damages, it was sustained by her. The instruction is not subject to the criticism made. There was some evidence that she would continue to suffer from headaches, and the instruction itself listed the consideration of the jury to such future suffering and loss of ability to work.

The injury was a severe one and we do not consider the verdict excessive.

For the reasons stated in this opinion the judgment of the Superior Court is affirmed.

JUDGMENT AFFIRMED.

SENT TO JAIL, 4-11-38.

36268

HANNAH SHELBERG,

Plaintiff - Appellee.

v.

NATIONAL TEA CO., a Corporation,

Defendant - Appellant.

103
APPEAL FROM

SUPERIOR COURT.

COOK COUNTY.

270 I.A. 632²⁻

Opinion filed May 24, 1933

MR. PRESIDING JUSTICE WILSON DELIVERED THE OPINION OF THE COURT.

Plaintiff recovered a judgment in the Superior Court for \$3500.00 upon a verdict of the jury for personal injuries sustained by reason of an accident occurring upon the premises of the defendant. The declaration consisted of one count and charged that on December 24, 1929, plaintiff entered the store of the defendant for the purpose of purchasing groceries and that it became the duty of the defendant, by its servants, to keep the premises in a safe condition, but that the defendant failed to observe this duty and instead carelessly and negligently permitted the floor of the store to be and become and remain wet, icy and slippery and that, as a result thereof, plaintiff slipped and fell.

The facts in the case are not complicated nor are they materially controverted as to the manner of the happening of the accident. Plaintiff was driven by her husband to the store of the defendant sometime between 6:00 and 6:30 o'clock in the evening. It was cold and snowing. She alighted from the car and went into the store where there were perhaps 10 or 12 customers and purchased some supplies for supper. The plaintiff testified that the floor of the store was wet and there was snow and ice inside the door where people had come in and one Zeiler, an employee of the defendant and manager of the store, testified that he observed customers tracking snow into the premises and that he mopped it up and took some corrugated cardboard and placed it upon the floor of the store near the door to prevent people from falling and slipping.

Opinion filed May 24, 1933

MR. JUSTICE BRIDGES delivered the opinion of the court.

Plaintiff recovered a judgment in the Superior Court for \$100.00 from a verdict of the jury for personal injuries sustained by reason of an accident occurring upon the premises of the defendant. The declaration consisted of one count and charged that on December 31, 1929, plaintiff entered the store of the defendant for the purpose of purchasing groceries and that it became the duty of the defendant, by its servants, to keep the premises in a safe condition, and that the defendant failed to observe this duty and instead was

negligent and negligently caused the floor of the store to be so

rough and uneven as to cause plaintiff to slip and fall.

The facts in the case are not controverted and are that plaintiff was injured as the result of the happening of the accident. Plaintiff was driven by her husband to the store of the defendant sometime between 11:00 and 1:00 o'clock in the morning. It was cold and snowing. She alighted from the car and went into the store where some one was waiting to get in groceries and

some supplies for the night. The plaintiff testified that the floor of the store was wet and there was snow and ice inside the door where people had come in and one roller, an employee of the defendant and manager of the store, testified that he observed customers tracking snow into the premises and that he noticed it on and took some corrugated cardboard and placed it upon the floor of the store near the door to prevent people from falling and slipping.

Plaintiff testified that after she had made her purchases and started to leave she stepped on one of these pieces of corrugated cardboard and that it slipped from under her and she fell and injured her knee; that she was taken home and that night she was attended by a friend who was a trained nurse and that her right knee pained her severely; that afterwards she saw a physician who told her to go to bed and keep off of the limb and he put a splint on her leg which remained on for more than two weeks; that she saw another physician for over a period of nine weeks but that her leg was no better, and was swollen at the knee; that she has been unable since that time to do her house work and got around the house by moving from chair to table and supporting herself against the walls of her home; that her knee was weak and would lock on her and that she had to walk with crutches.

The physician testified that upon an examination of the plaintiff he found that she had a loose cartilage in the knee joint; that this is a gristly part that covers the bone and prevents friction; that there is a synovial fluid between the two surfaces that keeps the joint lubricated and that when this cartilage becomes bruised as the result of an injury it will break off and move about from place to place in the joint. If this cartilage slips in between the joint it locks and the knee cannot be used; that this causes an inflammatory condition and the injury is permanent in its nature; that it would require an operation to remove the broken cartilage from the joint of the knee.

Considerable space is devoted by counsel for the defendant to the proposition that the owner of premises is liable only for injuries occasioned by the unsafe condition of the premises, if such condition were known to him. There is no force in this argument because of the fact that the defendant knew of the condition of the floor and attempted to remove the danger by placing corrugated cardboard upon the floor.

Witness testified that after she had made her purchases and started to leave she stopped on one of these pieces of extra-
boarded cardboard and that it slipped from under her and she fell and
injured her knee; that she was taken home and that night she was
attended by a friend who was a trained nurse and that her right knee
swelled her severely; that afterwards she saw a physician who told her
to go to bed and keep off of the limb and he put a splint on her leg
which remained on for more than two weeks; that she saw another
physician for over a period of nine weeks but that her leg was no
better, and was swollen at the knee; that she had been unable since
that time to do her house work and get around the house by moving
from chair to table and supporting herself against the walls of
her house; that her knee was weak and would lock on her and that she
had to walk with crutches.

The physician testified that upon an examination of the
plaintiff he found that she had a loose cartilage in the knee joint;
that this is a fairly rare thing and that it causes the knee
that there is a synovial fluid between the two surfaces that make
the joint lubricated and that when this cartilage becomes displaced as
the result of an injury it will break off and move about from place
to place in the joint. It this cartilage slips in between the joint
it locks and the knee cannot be used; that this causes an inflammatory
condition and the injury is permanent in its nature; that it would
require an operation to remove the broken cartilage from the joint
of the knee.

Considerable space is devoted by counsel for the defendant
in the proposition that the cause of plaintiff's injury is liable only for
injuries caused by the direct condition of the plaintiff. It was
condition was known to him. There is no force in this argument
because of the fact that the defendant knew of the condition of the
limb and attempted to remove the danger by placing a splint
on the limb.

It is also insisted that the evidence does not support the declaration in that the plaintiff did not slip because of the wet and icy condition of the floor, but because she stepped upon a piece of cardboard which was the proximate cause of the accident. With this contention we are unable to agree inasmuch as it appears to this court that the accident was caused by the wet and icy condition of the floor, as charged in the declaration. The cardboard was placed upon the floor by the defendant because of this condition and the jury by its verdict found that the cardboard itself slipped from under the plaintiff because of the condition of the floor. The judgment is not contrary to the manifest weight of the evidence.

There was no reversible error in the giving of instructions 2 and 3, nor do we consider that the verdict is excessive.

Objection is made to some of the answers of the plaintiff, which were permitted to go into evidence, but we have examined these and find that they were not subject to the objection raised in the briefs.

Finding no reversible error in the trial of the cause and for the reasons stated in this opinion, the judgment of the Superior Court is affirmed.

JUDGMENT AFFIRMED.

HEBEL AND HALL, JJ. CONCUR.

It is also insisted that the evidence does not support the

declaration in that the plaintiff did not slip because of the wet

and icy condition of the floor, but because she stepped upon a piece

of cardboard which was the proximate cause of the accident. With

this contention we are unable to agree inasmuch as it appears to this

court that the accident was caused by the wet and icy condition of

the floor, as charged in the declaration. The cardboard was placed

upon the floor by the defendant because of this condition and the

jury by its verdict found that the cardboard itself slipped from

under the plaintiff because of the condition of the floor. The jury

was in not contrary to the manifest weight of the evidence.

There was no reversible error in the giving of instructions

3 and 4, nor do we consider that the verdict is excessive.

Objection is made to some of the answers of the plaintiff,

which were permitted to go into evidence, but we have examined these

and find that they were not subject to the objection raised in the

plea.

Nothing is reversible error in the trial of the case.

and for the reasons stated in this opinion, the judgment of the

superior court is affirmed.

JOSEPH L. LUTHER

WILLIAM H. HALL, JR. COUNSEL

36286

FRANK CLAVELLI, as Administrator of
the Estate of Lorado Clavelli,
deceased,

Plaintiff - Appellee,

v.

BOYDA DAIRY CO., a Corporation,

Defendant - Appellant.

APPEAL FROM

SUPERIOR COURT

COOK COUNTY.

270 I.A. 632³

Opinion filed May 24, 1933

MR. PRESIDING JUSTICE WILSON DELIVERED THE OPINION OF THE COURT.

Plaintiff, as administrator, recovered a judgment in the Superior Court of Cook County against the defendant Boyda Dairy Co. because of the death of Lorado Clavelli, deceased, arising out of injuries sustained by him at the corner of Wrightwood and Laramie avenues, two intersecting streets in the City of Chicago. Plaintiff's intestate was struck by a truck of the defendant company and received the injuries from which he died.

From the facts it appears that the deceased was of the age of 12 years and was acting as a patrol boy at the crossing. He had a white belt around his waist and across his shoulder to indicate that he was there for the purpose of looking after the children who were crossing the street to attend the school located near by. The accident occurred a few minutes before 9 o'clock on the morning of April 2, 1931. Wrightwood avenue at this point runs east and west and Laramie avenue runs north and south.

One Janaki, a witness on behalf of the plaintiff, testified that the deceased was standing near the northwest corner of Laramie and Wrightwood avenues, about 10 or 12 feet out into the street from the northwest corner, a little north of Wrightwood near the crosswalk. This witness also testified that the truck of the defendant was going east on Wrightwood and made a short left turn at the corner of Wrightwood and Laramie avenues about 2 or 10 feet from the northwest corner; that he did not hear a horn or signal and that the truck was traveling quite fast.

WILLIAM LAMMILL, an Administrator of the Estate of LAMMILL, deceased,

Plaintiff - Appellee,

BOYD DAIRY CO., a Corporation,

Defendant - Appellant.

Opinion filed May 24, 1933

MR. PRESIDING JUSTICE WILSON DELIVERED THE OPINION OF THE COURT.

Plaintiff, an administrator, recovered a judgment in the Superior Court of Cook County against the defendant Boyd Dairy Co. because of the death of LAMMILL, deceased, arising out of injuries sustained by him at the corner of Wrightwood and Laramie avenues. The introductory facts in the bill of particulars are as follows:

LAMMILL was struck by a truck of the defendant company and received the injuries from which he died.

From the facts it appears that the deceased was of the age of 12 years and was acting as a patrol boy at the crossing. He had a white belt around his waist and across his shoulder to indicate that he was there for the purpose of looking after the children who were crossing the street to attend the school located near by. The accident occurred a few minutes before 9 o'clock on the evening of April 2, 1931. The witness, a white female, was standing near the northwest corner of Wrightwood and Laramie avenues, about 10 or 12 feet out into the street from the northwest corner, a little north of Wrightwood near the crosswalk. This witness also testified that the truck of the defendant was going west on Wrightwood and made a short left turn at the corner of Wrightwood and Laramie avenues about 8 or 10 feet from the northwest corner; that he did not hear a horn or signal and that the driver

Sulak, another witness on behalf of plaintiff, testified that the boy was a little off the sidewalk and two or three feet from the curb; that he saw the truck make a left turn from Wrightwood, about three feet from the curb at the northwest corner, and that at the time it was traveling about 15 miles an hour.

The declaration charged negligence in general terms and also a violation of the Motor Vehicle Act in that in turning the corner, the truck cut across instead of taking the wide turn.

Defendant contends that the judgment is contrary to the law and evidence, and that plaintiff failed to show negligence on the part of the defendant and also failed to show that the deceased at and just prior to the time of the accident was in the exercise of due care for his own safety.

The driver of the truck testified that as he turned the corner the boy ran out into the street, but this is not corroborated by any other witness in the case.

There is evidence on behalf of the plaintiff showing a violation of the Motor Vehicle Act in that the truck cut the corner instead of taking the wide turn as provided by the statute. The evidence in the record is sufficient to sustain the finding of negligence on the part of the defendant and the question of due care on the part of the deceased was one of fact for the jury. Sohn v. Balton, 206 Ill. App. 374; City of Chicago v. McCrudden, 92 Ill.App.257.

The deceased at the time of the accident was of the age of 12 years and the law requires a person of that age to use only that degree of care which would ordinarily be expected of a person of his years.

We find no error in the refusal of the court to give defendant's instruction number 18. This instruction contained an abstract

...testified that the boy was a little off the sidewalk and two or three feet from the curb; that he saw the truck make a left turn from rightward, about three feet from the curb at the northeast corner, and that at the time it was traveling about 15 miles an hour.

The defendant charged negligence in general terms and also a violation of the Motor Vehicle Act in that in turning the corner, the truck cut across instead of taking the wide turn. Plaintiff contends that the judgment is contrary to the law and evidence, and that plaintiff failed to show negligence on the part of the defendant and also failed to show that the deceased at the time of the accident was in the exercise of due care for his own safety.

The driver of the truck testified that as he turned the corner the boy ran out into the street, but this is not corroborated by any other witness in the case.

There is evidence on behalf of the plaintiff showing a violation of the Motor Vehicle Act in that the truck cut the corner instead of taking the wide turn as provided by the statute. The evidence in the record is sufficient to sustain the finding of negligence on the part of the defendant and the question of due care on the part of the deceased was one of fact for the jury. Reyn v. ...

Reyn v. ... The deceased at the time of the accident was of the age of 13 years and the law requires a person of that age to use only that degree of care which would ordinarily be expected of a person of his years.

We find no error in the refusal of the court to give defendant's instruction number 18. This instruction contained an abstract

proposition of law and was fully covered by defendant's given instruction number 16.

Finding no reversible error, the judgment of the Superior Court is affirmed.

JUDGMENT AFFIRMED.

HEBEL AND HALL, JJ. CONCUR.

EXHIBITION OF THE NEW YORK PUBLIC LIBRARY

EXHIBITION NUMBER 10

EXHIBITION OF THE NEW YORK PUBLIC LIBRARY

EXHIBITION NUMBER 10

EXHIBITION NUMBER 10

EXHIBITION NUMBER 10

36298

LEATI HARBUS,

(Plaintiff) Appellee,

v.

CHAFELL ICE CREAM CO., a corporation,

(Defendant) Appellant.

APPEAL FROM

SUPERIOR COURT,

COOK COUNTY.

270 I.A. 632⁴

Opinion filed May 24, 1933

MR. PRESIDING JUSTICE WILSON DELIVERED THE OPINION OF THE COURT.

Plaintiff recovered a judgment for \$25,000 in the Superior Court of Cook County because of injuries sustained by reason of a collision between an automobile which plaintiff was driving and a truck belonging to the defendant. The question as to the amount of the judgment is not raised and will not, therefore, be considered.

But two points are raised by the defendant upon which the court is asked to reverse the judgment: First, that the evidence does not support the judgment, particularly in view of section 53 of An Act in Relation to Motor Vehicles, Cahill's Illinois Revised Statutes, 1929, Chapter 95a, paragraph 34; Second, the action of the trial court in limiting the cross-examination of one of the witnesses testifying on behalf of the plaintiff.

The section of the Motor Vehicle Act referred to, follows:

"Except as hereinafter provided motor vehicles traveling upon public highways shall give the right-of-way to vehicles approaching along intersecting highways from the right and shall have the right-of-way over those approaching from the left."

From the evidence it appears that on the day of the accident plaintiff was driving a Buick automobile in a westerly direction in School street at its intersection with Ashland avenue. The day was clear and the pavement was dry. Ashland avenue is 36 feet wide from curb to curb. The defendant at the time was operating one of its trucks in a southerly direction on Ashland avenue.

EMILY HARRIS

(Plaintiff) Appellee

UNITED STATES COURT

WEST VIRGINIA

EMILY HARRIS vs. JAMES HARRIS

(Defendant) Appellant

Opinion filed May 24, 1933

270 I.A. 632

THE FOLLOWING JUDGMENT WAS ENTERED BY THE COURT:

Plaintiff recovered a judgment for \$25,000 in the Superior

Court of Cook County because of injuries sustained by reason of a

collision between an automobile which plaintiff was driving and a truck

belonging to the defendant. The question as to the amount of the

judgment is not raised and will, not, therefore, be considered.

But two points are raised by the defendant upon which the

court is asked to reverse the judgment: First, that the evidence does

not support the judgment, particularly in view of section 32 of an

Act in relation to Motor Vehicles, Chapter 92, Illinois Revised Statutes,

1929, Chapter 92, paragraph 34; Second, the action of the trial court

in limiting the cross-examination of one of the witnesses testifying

on behalf of the plaintiff.

The action of the Motor Vehicle Act referred to, follows:

"Whenever a motorist provides motor vehicles traveling upon public highways shall give the right-of-way to vehicles approaching along intersecting highways from the right and shall have the right-of-way over those approaching from the left."

From the evidence it appears that on the day of the accident

plaintiff was driving a Buick automobile in easterly direction in

School street at the intersection with Ashland avenue. The day was

clear and the pavement was dry. Ashland avenue is 32 feet wide from

curb to curb. The defendant at the time was operating one of its

trucks in a southerly direction on Ashland avenue.

The plaintiff testified that she was 28 years of age and had been driving a car since she was 15 years old; that the accident happened on September 10, 1925, about 4:30 o'clock in the afternoon; that she was driving in a westerly direction on School street near the curb and that there was no traffic in front of her; that she came to a stop with the front of her car at the crosswalk on Ashland avenue before proceeding across; that she looked to the south and then north and saw a truck approaching from the north about 220 feet away; that the truck was proceeding at from 15 to 18 miles an hour; that she started to cross the street and her car was completely across the car tracks on Ashland avenue when the truck ran into the rear right hand side of her car, throwing her against the steering wheel and twisting her back against the seat and as a result of the injuries she fainted.

Fern Allen, a sister of the plaintiff, testified that she was riding in the car with the plaintiff at the time of the accident and that the car stopped at Ashland avenue and she looked north and saw the truck about 125 to 150 feet from School street; that the automobile driven by her sister started to go across Ashland avenue and was proceeding at a speed of from 5 to 6 miles an hour; that when she again noticed the truck it was right on top of them.

A witness Hahn testified that he was on the corner of Ashland avenue and School street, but did not notice plaintiff's automobile before the accident, but saw the truck 20 or 25 feet north of him; he did, however, see the truck run into the automobile.

A witness by the name of Vanderheyden testified that he was on the corner of School street and Ashland avenue on September 10, 1925, when he witnessed the collision between plaintiff's car and the truck of the defendant; that he was standing near his car which

The plaintiff testified that she was 28 years of age and had been driving a car since she was 18 years old; that the accident happened on September 10, 1935, about 4:30 o'clock in the afternoon; that she was driving in westerly direction on School street near the curb and that there was no traffic in front of her; that she came to a stop with the front of her car at the crosswalk on Ashland Avenue before proceeding across; that she looked to the south and then north and saw a truck approaching from the north about 250 feet away; that the truck was proceeding at from 12 to 18 miles an hour; that she started to cross the street and her car was completely across the car tracks on Ashland Avenue when the truck ran into the rear right hand side of her car, throwing her against the steering wheel and twisting her back against the seat and as a result of the injuries she fainted.

John Allen, a sister of the plaintiff, testified that she was riding in the car with the plaintiff at the time of the accident and that the car stopped at Ashland Avenue and she looked north and saw the truck about 125 to 150 feet from School street; that the automobile driven by her sister started to go across Ashland Avenue and was proceeding at a speed of from 5 to 8 miles an hour; that when she again looked the truck it was right on top of her.

A witness John testified that he was on the corner of Ashland Avenue and School street, but did not believe plaintiff's version of the accident, but saw the truck 30 or 35 feet north of him; he did, however, see the truck run into the automobile.

A witness by the name of Vandenheyden testified that he was on the corner of School street and Ashland Avenue on September 10, 1935, when he witnessed the collision between plaintiff's car and the truck of the defendant; that he was standing near his car which

was parked on School street and saw plaintiff start up her car to cross Ashland avenue; that at this time the truck was from 100 to 125 feet away and proceeding at the rate of from 15 to 18 miles an hour; that when the automobile crossed the west track on Ashland avenue the truck hit it in the rear; that the truck did not slow down or change its speed before the crash and he heard no horn nor signal of warning of any kind before the collision; that after the collision the front end of the truck went past the Buick from 2 to 4 feet and the Buick was almost up to the northwest curbstones; that the automobile was almost turned around in School street.

The driver of the truck, Austin Watt, testified on behalf of the defendant that at a point within 50 to 100 feet from School street he was driving at from 8 to 10 miles an hour; that when he first saw the automobile it was 25 or 30 feet east of the east sidewalk and that he was within 10 or 15 feet from the north side of School street; that he slowed down but the Buick kept on coming; that it was traveling at a speed of about 25 miles an hour; that in order to keep from hitting it he turned to the right but the automobile kept on coming. On cross-examination he testified that plaintiff ran into the side of the truck.

The witness Senkewicz, on behalf of the defendant, testified that he was driving a truck for the John T. Cunningham Ice Cream Co.; that he was driving south on Ashland avenue, about 40 feet behind the truck of defendant; that when he first saw the Buick it was on School street at about the Ashland avenue building line and going west; that it was traveling at about the rate of 25 miles an hour and slowed down; that the Buick and the truck came together at a V-shaped angle; that the truck at the time of the accident was traveling at a speed of from 8 to 9 miles an hour.

was parked on School Street and was relatively close to her car to
cross Oakland Avenue; that at this time the truck was from 100
to 125 feet away and proceeding at the rate of from 15 to 18 miles
an hour; that when the automobile crossed the west crosswalk on School
Avenue the truck hit it in the rear; that the truck did not slow
down or change its speed before the crash and he heard no horn nor
signal of warning at any time before the collision; that after the
collision the front end of the truck went past the Buick from 5 to
4 feet and the Buick was almost up to the northwest curbstone; that the
automobile was almost turned around in School Street.
The driver of the truck, Austin Watt, testified on behalf of
the defendant that at a point within 50 to 100 feet from School Street
he was driving at from 8 to 10 miles an hour; that when he first saw
the automobile it was 35 or 30 feet east of the east sidewalk and
that he was within 10 or 15 feet from the north side of School Street;
that he slowed down but the Buick kept on coming; that it was traveling
at a speed of about 25 miles an hour; that in order to keep from
hitting it he turned to the right but the automobile kept on coming.
On cross-examination he testified that Plaintiff ran into the side
of the truck.
The witness Gennert, on behalf of the defendant, testified
that he was driving a Buick car at the time of the accident at a speed of
that he was driving south on Oakland Avenue, about 40 feet behind
the truck of defendant; that when he first saw the Buick it was on
School Street at about the Oakland Avenue building line and going
west; that it was traveling at about the rate of 25 miles an hour
and slowed down; that the Buick and the truck came together at a
T-shaped angle; that the truck at the time of the accident was travel-
ing at a speed of from 8 to 9 miles an hour.

It is insisted that under the evidence the driver of defendant's truck had the right-of-way by reason of the statute and that therefore plaintiff was guilty of contributory negligence which would preclude a recovery. This question has been presented to courts of review in this state on numerous occasions and it has been repeatedly held that it was a question of fact for the jury as to whether or not the car approaching from the right had the right of way within the meaning and intendment of the statute. As has been stated in numerous cases, it depends upon the circumstances. If the car approaching from the right is sufficiently distant to warrant the driver of the car approaching from the left to believe that he could cross in safety, then, evidently, there would be no violation of the statute in proceeding so to do. The car approaching from the right might be so far distant that it would be an absurdity to require others to wait until it had passed the street intersection. No definite rule can be laid down and the courts have adopted the construction that it becomes a question of fact as to whether or not there had been a violation of the statute. Heidler Co. v. Wilson & Bennett Co., 243 Ill. App. 89; Salmon v. Wilson, 227 Ill. App. 286; Schwartz v. Lindquist, 251 Ill. App. 320.

This court had occasion to consider the facts in this case in Fisher v. Chappell Ice Cream Co., 256 Ill. App. 605. In that case Bessie Fisher was a passenger in the car driven by Lenti Harbus, plaintiff in the case pending before this court. A somewhat different situation existed in the case of Fisher v. Chappell Ice Cream Company, in that plaintiff was a passenger. In that case, however, it was argued that the record failed to disclose negligence on the part of the defendant by reason of the operation of its truck. A jury found, however, in that case, that the defendant was guilty of negligence and another jury in the case now pending before us for consideration

It is insisted that under the evidence the driver of defendant's truck had the right-of-way by reason of the statute and that therefore plaintiff was guilty of contributory negligence which would preclude a recovery. This question has been presented on several occasions in this state on numerous occasions and it has been repeatedly held that it was a question of fact for the jury as to whether or not the car approaching from the right had the right of way within the meaning and intent of the statute. As has been stated in numerous cases, it depends upon the circumstances. If the car approaching from the right is sufficiently distant so that the driver of the car approaching from the left is unable to see it, the car approaching from the left is believed that he could cross in safety. Then, evidently, there would be no violation of the statute in proceeding as to do. The car approaching from the right might be so far distant that it would be an expediency to require others to wait until it had passed the street intersection. No definite rule can be laid down and the courts have adopted the construction that it becomes a question of fact as to whether or not there had been a violation of the statute. Wheeler v. Wilson & Bennett Co., 243 Ill. 577; Wilson v. Wilson, 247 Ill. 477; Wilson v. Wilson, 251 Ill. 477; Wilson v. Wilson, 251 Ill. 477.

This court had occasion to consider the facts in this case in Wilson v. Wilson, 251 Ill. 477. In that case Justice Fisher was a passenger in the car driven by Louis Wilson, plaintiff in the case pending before this court. A somewhat different situation existed in the case of Wilson v. Wilson, 251 Ill. 477. In that case, however, it was argued that the record failed to disclose negligence on the part of the defendant by reason of the operation of its truck. A jury found, however, in that case, that the defendant was guilty of negligence and another jury in the case now pending before us for consideration

found such to be the case, practically on the same set of facts. In the former opinion it was held:

"It is apparent from the foregoing recitation of evidence that it is in sharp conflict. The duty of reconciling the discrepancies in the testimony of the parties was the burthen and duty of the jurors. It was their duty to reconcile, if possible, these conflicts in the evidence and from the manner and appearance of the several witnesses in giving their testimony to conclude which of the witnesses were entitled to the greater credence, and in arriving at their verdict to give effect to the testimony of such witnesses as they believed testified to the truth, and on the other hand to discredit the testimony of such other witnesses whose testimony they disbelieved. If the jury believed the witnesses of plaintiff and disbelieved the witnesses of defendant, where their testimony was in conflict with that of the plaintiff, they had a right so to do, and if the testimony of plaintiff's witnesses taken alone is sufficient to justify the jury's verdict, then it is not the duty of this court to set such verdict aside unless it appears from all the evidence that the verdict is contrary to its probative force. We are of the opinion from a review of all the evidence that it is of sufficient probative force to warrant and sustain the verdict finding defendant guilty of the actionable negligence charged in the declaration.

Whether or not defendant's truck had the right of way is likewise a question of fact for the jury to decide."

The jury in the case at bar had an opportunity of seeing the witnesses and observing their demeanor while testifying, and the rule is too well established for us to depart from it, namely, that this court will not reverse unless the testimony is manifestly against the weight of the evidence. The testimony on behalf of the plaintiff, standing alone, was amply sufficient to support the verdict.

As to the second contention of the defendant - that the trial court committed reversible error in limiting the scope of cross-examination - we are of the opinion that this objection is not well taken. The questions of fact involved, concerning which the witness Allen testified, were not intricate or involved. Sixty-two pages of the record are devoted to the cross-examination of this witness and from an examination of this cross-examination we believe that counsel for defendant were given sufficient latitude. The subject was fully

found such to be the case, practically on the same set of facts. In

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The jury in the case at bar had an opportunity of seeing

role is too well established for us to doubt that it, namely, that the witnesses and observing their testimony while testifying, and the

the weight of the evidence. The testimony on behalf of the minority
this court will not reverse unless the testimony is manifestly against

standing alone, was amply sufficient to support the verdict.

as to the second sentence known not to be

trial court committed reversible error in limiting the scope of

strongest objection - we are of the opinion that this objection is not

For details were given sufficient latitude. The subject was fully free an examination of this cross-examination we believe that document at the hearing are devoted to the cross-examination of this witness and were fully testified, were not included as involved. Fifty-two pages will given. The questions of fact involved, concerning which the witness

covered both on direct and cross-examination.

We see no reason for reversing the judgment and, therefore, in accordance with the views herein expressed the judgment of the Superior Court is affirmed.

JUDGMENT AFFIRMED.

HESEL AND HALL, JJ. CONCUR.

covered both on direct and cross-examination.

It was also found that the evidence was not sufficient to establish the guilt of the

defendant and the jury returned a verdict of acquittal.

The Court is satisfied.

THE COURT.

THE COURT.

36308

THE ELECTRIC AUTO-LITE CO., a
Corporation,

(Plaintiff) Appellee,

v.

WIEBOLDT STORES, INC., a
Corporation,

(Defendant) Appellant.

APPEAL FROM

MUNICIPAL COURT

OF CHICAGO.

270 I.A. 633¹

Opinion filed May 24, 1933

MR. PRESIDING JUSTICE WILSON DELIVERED THE OPINION OF THE COURT.

Plaintiff brought its action against the defendant to recover the price of 6,000 electric clocks sold to the defendant on October 22, 1931. The cause was tried before a jury and the court directed a verdict in favor of plaintiff for the sum of \$3,365.91 and judgment was entered on the verdict. The affidavit of merits filed in the cause admitted that the defendant ordered and received the goods. Defendant claimed, however, that under a subsequent oral agreement the plaintiff agreed that if the defendant was unable to sell the clocks at a specified price to the trade, it would take the clocks back. Under the pleadings the plaintiff offered no testimony in the first instance and the defendant, on its own behalf, produced the testimony of certain witnesses in support of its contention.

Luckman, called on behalf of the defendant, testified that at the time of the transaction he was connected with the defendant company and that he talked with a man by the name of Bates who told him he was salesmanager of the Electric Auto-Lite Company. This conversation was in September, and that as a result of this and other conversations with Bates the defendant purchased 6,000 clocks which were subsequently delivered. The witness further testified that it was stipulated between himself and Bates that the clocks were to be sold retail at 98¢ a piece; that he prepared an advertisement for the purpose of selling said clocks and that Bates again called upon him and informed

RECEIVED FROM

THE ELECTRIC AUTO-LITE CO., INC.

MUNICIPAL COURT

(Plaintiff) Defendant

OF CHICAGO

RECEIVED FROM THE ELECTRIC AUTO-LITE CO., INC.

33308 I.A. 633

(Defendant) Plaintiff

Opinion filed May 24, 1933

MR. PRESIDING JUSTICE WILSON DELIVERED THE OPINION OF THE COURT.

Plaintiff brought its action against the defendant to recover the price of \$1,000 electric clocks sold to the defendant on October 20, 1931. The cause was tried before a jury and the court directed a verdict in favor of plaintiff for the sum of \$1,000.91 and judgment was entered on the verdict. The affidavit of merits filed in the cause admitted that the defendant ordered and received the goods. Defendant claimed, however, that under a subsequent oral agreement the plaintiff agreed that if the defendant was unable to sell the clocks at a specified price by the date it would take the clocks back. Under the findings the plaintiff offered no testimony in the trial and the defendant, on its own behalf, produced the testimony of certain witnesses in support of its contention.

Lockman, called on behalf of the defendant, testified that at the time of the transaction he was connected with the defendant company and that he talked with a man by the name of Bates who told him he was representative of the Electric Auto-Lite Company. This conversation was in September, and that as a result of this and other conversations with Bates the defendant purchased 5,000 electric clocks which were subsequently delivered. The witness further testified that it was understood between himself and Bates that the clocks were to be sold retail at not a dime; that he prepared an advertisement for the purpose of selling said clocks and that Bates again called upon him and informed

him that the Boston Store, which was also selling these clocks, was angry because Bates had sold the clocks to the defendant and that the Boston Store was going to cut the retail price of the clocks to the trade if they should be advertised by the defendant; that the witness then said that if that were the case he should be the first one to cut the price of the clock and would sell it for 89¢; that Bates said he must not do that because it would ruin their trade in this territory; that finally it was agreed that the clocks could be advertised for sale by the defendant for 89¢ and that if the defendant was not able to sell these clocks at that price, the plaintiff would take off of the hands of the defendant all of the clocks left unsold after the running of the advertisement; that Bates also stated that if the defendant was unable to sell these clocks at the price agreed upon he would have no trouble disposing of them elsewhere. The witness also stated that the night of the day upon which this conversation was had he, together with Bates, went to Toledo where the plant of the Electric Auto-Lite was situated; that he visited the factory of the plaintiff company where he met a Mr. Kelly who was introduced to him as the vice president of the plaintiff company and that Kelly informed the witness that all matters pertaining to the clocks and their deliveries were left to Mr. Bates and that he, Bates, was operating the Chicago end of the division.

The order for the delivery of the clocks by the plaintiff was dated October 22. The visit to Toledo was November 2 or 3. The first advertisement placing the retail price of the clocks at 89¢ was run on or about October 24 or 25. The conversation between the witness Luckman and Bates was on or about October 28 or 29.

Two other witnesses called on behalf of the plaintiff corroborated the testimony of Luckman. At the end of defendant's testimony the court instructed the jury to return a verdict in favor of the plaintiff.

him that the Boston Store, which was also selling these clocks, was
angry because Bates had sold the clocks to the defendant and that
the Boston Store was going to cut the retail price of the clocks to
the trade if they should be advertised by the defendant; that the
witness then said that if that were the case he should be the first
one to cut the price of the clock and would sell it for 65¢; that Bates
said he must not do that because it would ruin their trade in this
territory; that finally it was agreed that the clocks would be adver-
tised for sale by the defendant for 65¢ and that if the defendant was
not able to sell these clocks at that price, the plaintiff would take
all of the hands of the defendant all of the clocks left unsold after
the running of the advertisement; that Bates also stated that if the
defendant was unable to sell these clocks at the price agreed upon he
would have no trouble disposing of them elsewhere. The witness also
stated that the night of the day upon which this conversation was had
he, together with Bates, went to Toledo where the plant of the plaintiff
Auto-Lite was situated; that he visited the factory of the plaintiff
company where he met a Mr. Kelly who was introduced to him as the vice
president of the plaintiff company and that Kelly informed the witness
that all matters pertaining to the clocks and their delivery were
left to Mr. Bates and that he, Bates, was operating the Chicago end
of the division.
The order for the delivery of the clocks by the plaintiff
was dated October 21. The visit to Toledo was November 2 or 3. The
first advertisement showing the retail price of the clocks at 65¢
was run on or about October 24 or 25. The conversation between the
witness Luskman and Bates was on or about October 26 or 28.
The other witnesses called on behalf of the plaintiff cor-
roborated the testimony of Luskman. At the end of defendant's testi-
mony the court instructed the jury to return a verdict in favor of
the plaintiff.

From the evidence it may be gathered that the original purchase of the clocks by the defendant was an outright purchase and sale; that subsequently it appeared that the clocks could not be sold in quantities to the retail trade at 98¢. There is testimony also to the effect that there were others handling the clock in the Chicago district who were contemplating cutting the retail price. It was a matter of importance to the vendor that a situation be prevented under which the retail price would be cut to such an extent as to destroy the market for those purchasing from the plaintiff for the purpose of re-sale to the public generally. Parties to a contract have a right to modify an agreement even after its execution. It is true that the sale of the clocks in question was a completed sale and delivery made, but there is evidence in the record from which it can be gathered that Bates and the agents of the defendant company entered into an agreement under which Bates, on behalf of his company, undertook to take back such clocks as remained unsold provided the defendant was not able to dispose of them at a price agreed upon between Bates and the defendant company. There was no reason why such an agreement should not be binding in view of the fact that the defendant may have been unable to make sales of the clocks at the price fixed, provided Bates had the authority to enter into the agreement on behalf of his employer. Commercial Car Line v. John A. Anderson, et al, etc., 224 Ill. App. 187. A number of cases are cited in opposition to this rule, but from an examination of these cases it appears that they have to deal with special subjects such as the sale of land where the agency is a particular agency for a single transaction. The transaction having been completed the agency ends.

The case of James M. Ide v. Brody, 156 Ill. App. 479, cited by plaintiff in support of its contention that the agent had no authority to make an offer of repurchase on behalf of his principal at the time of the sale, is not in point. The evidence in that case does

From the evidence it may be gathered that the original pur-
chase of the clocks by the defendant was an outright purchase and
not a lease; that independently it appeared that the clocks could not be sold
in competition to the retail trade at 95¢. There is testimony also
to the effect that there were others handling the clocks in the
Chicago district who were negotiating outside the retail price. It
was a matter of language in the evidence that it is not possible to
state that the retail price would be one so much as to say that
they were marked for these purchases from the plaintiff for the
purpose of resale to the public generally. Parties to a contract
which is really an agreement even after its execution. It is true
that the sale of the clocks in question was a completed sale and deliv-
ery made, but there is evidence in the record from which it can be
gathered that Hater and the agent of the defendant company entered
into an agreement under which Hater, on behalf of his company, undertook
to take back such clocks as remained unsold provided the defendant
was not able to dispose of them at a price agreed upon between Hater
and the defendant company. There was no reason why such an agreement
should not be binding in view of the fact that the defendant may have
been unable to make sales of the clocks at the price fixed, provided
Hater had the authority to enter into the agreement on behalf of his
company. Hatter v. John L. Robertson, et al., 111 Ill. 473, 107
Ill. App. 367. A number of cases are cited in support of this rule,
but from an examination of these cases it appears that they have to
do with special subjects such as the sale of land where the money
is a particular security for a specific transaction. The transaction
being here completed the agency ends.
The case of James M. Ide v. Brown, et al., 118 Ill. App. 473, cited
by plaintiff in support of its contention that the agent had no
authority to make an offer of repurchase on behalf of his principal at
the time of the sale, is not in point. The evidence in that case does

not show that the offer to repurchase was made by the agent who made the sale. Moreover, it appears that the option to return the goods was not exercised by the buyer within a reasonable time thereafter. The instant case does not come within the rule that the agency can not be established by the agent in order to bind the principal, inasmuch as there is no question but that Bates was the agent of the plaintiff. When it is established that a certain individual is an agent and acting on behalf of a principal, the question as to whether or not he is acting within the scope of his employment and within his powers is usually one of fact for the jury. The rule is otherwise where the agency is only by implication. The Supreme Court of this State in the case of Faber-Musser Co. v. Dee Clay Co., 291 Ill. 240, in its opinion says:

"A general agent, unless he acts under a special and limited authority, impliedly has power to bind his principal by whatever is usual and proper to effect such a purpose as is the subject of his employment, and in the absence of known limitations third persons dealing with such a general agent have a right to act on the presumption that the scope and character of the business he is employed to transact measures the extent of his authority and to hold the principal responsible for the agent's acts within such authority." (2 Corpus Juris, 581; see to the same effect, 21 R. C. L. 854.) "Where a principal has by his voluntary act placed an agent in such a situation that a person of ordinary prudence, conversant with business usages and the nature of the particular business, is justified in presuming that such agent has authority to perform a particular act, and therefore deals with the agent, the principal is estopped as against such third person from denying the agent's authority." (21 R. C. L. 907).

There is evidence in the record before us from which it may be inferred that Bates was the representative of the plaintiff company in the Chicago district. There is nothing to indicate that his powers in that regard were limited, and it was a question of fact for the jury as to whether or not the defendant company had a right to rely upon the representations of Bates that the company would take back the clocks in the event the defendant would waive its right to sell them at a price below that which the plaintiff company was desirous of maintaining.

not show that the offer to repurchase was made by the agent who made the sale. Moreover, it appears that the option to return the goods was not exercised by the buyer within a reasonable time thereafter. The instant case does not come within the rule that the agency can not be established by the agent in order to bind the principal, inasmuch as there is no question but that Bates was the agent of the plaintiff. When it is established that a certain individual is an agent and acting on behalf of a principal, the question as to whether or not he is acting within the scope of his employment and within his powers is usually one of fact for the jury. The rule is otherwise where the agency is only by implication. The Supreme Court of this State in 100 Mass. at 100-101, 101 Mass. at 101-102, 102 Mass. at 102-103.

In the opinion says:

"A general agent, unless he acts under a special and limited authority, impliedly has power to bind his principal by whatever is usual and proper to effect such a purpose as is the subject of his employment, and in the absence of known limitations binds persons dealing with such a general agent with a right to act on the presumption that the agent has authority at the business he is employed to transact and elsewhere of his authority and to bind the principal in matters the agent's acts within such authority." (100 Mass. at 100-101, 101 Mass. at 101-102, 102 Mass. at 102-103.) There is nothing in the record before us from which it may

be inferred that Bates was the representative of the plaintiff company in the Chicago district. There is nothing to indicate that his powers in that regard were limited, and it was a question of fact for the jury as to whether or not the defendant company had a right to rely upon the representations of Bates that the company would take back the clocks in the event the defendant would waive its right to sell them at a price below that which the plaintiff company was desirous of obtaining.

We believe the trial court erred in directing a verdict as there was evidence to sustain the position taken by the defendant upon the trial.

For the reasons stated in this opinion the judgment of the Municipal Court is reversed and the cause remanded for a new trial.

JUDGMENT REVERSED AND CAUSE REMANDED.

HEBEL AND HALL, JJ. CONCUR.

to believe the trial court's verdict as

there was evidence to sustain the position taken by the defendant

upon the trial.

For the reasons stated in this opinion the judgment of the

trial court is reversed and the case remanded for a new trial.

REVEREND JUSTICE AND COURT REPORTER.

WILLIAM L. HILL, JR., COUNSEL.

36317

AUGUST CAMPETTO, Administrator of the
Estate of Josephine Spaniotto, Deceased,

(Plaintiff) Appellant,

v.

CHARLES R. BLESSING,

(Defendant) Appellee.

APPEAL FROM

SUPERIOR COURT,

COOK COUNTY.

Opinion filed May 24, 1933

270 LA 633²

MR. PRESIDING JUSTICE WILSON DELIVERED THE OPINION OF THE COURT.

August Campetto, Administrator of the Estate of Josephine Spaniotto, deceased, brought his action in the Superior Court to recover damages from the defendant because of the death of the deceased arising out of injuries sustained by reason of being struck by an automobile which was being operated by the defendant, Charles R. Blessing on the north drive of Garfield Park on April 12, 1931. A jury was waived and the cause tried by the court and judgment entered for the defendant at the end of the plaintiff's evidence. From this judgment an appeal was prayed and allowed to this court.

We have not been aided in our consideration of this cause by briefs filed on behalf of the defendant.

From the facts it appears that the deceased, together with her daughter and son-in-law, had been walking along a park path in Garfield Park and came to the boulevard known as the North Drive. This path was continued on the other side of the boulevard and it appears from the evidence that it was a continuous path and that it was customary for pedestrians to cross the boulevard in order to continue along the path provided by the park authorities. The accident happened on Sunday at about 3:20 o'clock in the afternoon. About a block east of this crossing used by pedestrians and persons in the park, there is a bend or curve in the north drive and there were bushes and trees along the driveway. The deceased and her companions were crossing North drive at this point. The son-in-law

ADMINISTRATOR OF THE
ESTATE OF JOSEPHINE

(Plaintiff) Defendant

v.

CHARLES A. BLOOMING

(Defendant) Plaintiff

SUPERIOR COURT

COOK COUNTY

Opinion filed May 24, 1933

THE FOLLOWING VERDICT WAS RETURNED BY THE JURY ON THE 24TH DAY OF MAY, 1933:

August 20, 1932, Administrator of the Estate of Josephine
Bloomington, deceased, brought his action in the Superior Court to
recover damages from the defendant because of the death of the
deceased arising out of injuries sustained by reason of being struck
by an automobile which was being operated by the defendant, Charles
A. Bloomington on the north drive of Garfield Park on April 12, 1931.
A jury was waived and the cause tried by the court and judgment
entered for the defendant at the end of the plaintiff's evidence. It
was judgment on appeal was reversed and allowed to this court.

We have not been aided in our consideration of this cause by
briefs filed on behalf of the defendant.

From the facts it appears that the deceased, together with
her daughter and son-in-law, had been walking along a path in
Garfield Park and came to the boulevard known as the North Drive.
This path was continued on the other side of the boulevard and it
appears from the evidence that it was a continuous path and that it
was customary for pedestrians to cross the boulevard in order to
continue along the path provided by the park authorities. The acci-
dent happened on Sunday at about 3:30 o'clock in the afternoon.
About a block east of this crossing used by pedestrians and persons
in the park, there is a bend or curve in the north drive and there
were bushes and trees along the driveway. The deceased and her
companions were crossing North Drive at this point. The son-in-law

had reached the opposite side in safety and had just stepped upon the curb. His wife, the daughter of the deceased, was in the act of stepping upon the curb when she as well as the deceased was struck by the fender of the oncoming car operated by the defendant. After deceased was struck by the car her body was dragged a distance of 100 to 125 feet from the crosswalk. The police officer testified that the body was lying at that distance from the crosswalk at the time he came upon the scene of the accident.

From the facts it is clear that there was evidence in support of the contention that the defendant was negligent in the operation of his car. One person was struck and killed, another person was struck and injured, and a third person narrowly escaped. The accident happened very close to the curb. It would be impossible to conceive that the driver of the car did not, or should not have seen this group of people. The fact that the body of the deceased woman was dragged a distance of 100 to 125 feet indicates that the car was driven at a high rate of speed. It would take evidence to overcome the presumption of negligence on the part of the driver.

The court's opinion must have been based on the proposition that the plaintiff's intestate was guilty of contributory negligence.

Engbreetsen, the police officer, testified that a person could see a car approaching a couple of blocks away if such person were standing on the crosswalk, but he does not testify from what point on the crosswalk such car could be seen.

Campetto, the son-in-law, testified that he saw the car and that it was going from 35 to 40 miles an hour, but that they had time to cross; that he did not hear a horn or signal and was about 6 inches from the curb when he saw the car about 15 feet away; that the North drive at this point is about 40 feet wide. His testimony is not entirely satisfactory in that he stated that after he saw the car coming they

had reached the opposite side in safety and had just stepped upon the curb. His wife, the daughter of the deceased, was in the act of stepping upon the curb when she as well as the deceased was struck by the tender of the oncoming car operated by the defendant. After deceased was struck by the car her body was dragged a distance of 100 to 125 feet from the crosswalk. The police officer testified that the body was lying at that distance from the crosswalk at the time he came upon the scene of the accident.

Now the fact is in issue that there was evidence in support of the contention that the defendant was negligent in the operation of his car. One person was struck and killed, another person was struck and injured, and a third person narrowly escaped. The accident happened very close to the curb. It would be impossible to conceive that the driver of the car did not, or should not have seen this group of people. The fact that the body of the deceased woman was dragged a distance of 100 to 125 feet indicated that the car was driven at a high rate of speed. It would take evidence to overcome the presumption of negligence on the part of the driver.

The court's opinion must have been based on the proposition that the plaintiff's testimony was guilty of contributory negligence. In fact, the police officer testified that a person could see a car approaching a couple of blocks away if such person were standing on the crosswalk, but he does not testify from what point on the crosswalk such car could be seen.

Conversely, the son-in-law testified that he saw the car and that it was going from 25 to 40 miles an hour, but that they had time to cross; that he did not hear a horn or signal and was about 8 inches from the curb when he saw the car about 15 feet away; that the North drive at this point is about 40 feet wide. His testimony is not entirely satisfactory in that he stated that after he saw the car coming they

kept on going across; that they had time to cross over the North drive and took a chance.

Angeline Campetto, the daughter, testified that her mother was 44 years of age at the time of her death and in good health; that about 400 feet east of the place where the accident occurred there was a curve in the road and bushes around and that she believed the right hand side of the car struck her mother. The police officer testified that the left headlight of the machine was broken. Angeline Campetto was asked some questions concerning her testimony at the coroner's inquest, but there was no testimony introduced as taken before the coroner in impeachment of her statements.

The trial court may have been of the opinion that the testimony of one or both of these witnesses indicated contributory negligence. The question as to whether or not these witnesses were guilty of contributory negligence was not the issue involved in the case. The question was whether or not the deceased was guilty of contributory negligence. The trial court should have heard all the evidence before entering its finding.

Plaintiff's intestate was rightfully at the point where the accident occurred, proceeding over and along a path provided by the park system, and had an equal right with the oncoming automobile to use the highway at that particular point. The plaintiff in operating his automobile through a public park on a Sunday afternoon was required to take notice of the fact that people would be in the park and particularly at the place in question. The fact that the plaintiff may have been able to see the machine for 400 feet, in and of itself does not constitute contributory negligence on her part in proceeding across the highway under the circumstances involved in this case. Under the view we take of the facts as they appear in the testimony, the court should have heard all the evidence before entering its finding.

kept on going around; that they had time to cross over the North
drive and took a chance.
In addition, the defendant, the plaintiff, testified that her mother
was 44 years of age at the time of the accident and in good health;
that about 400 feet east of the place where the accident occurred there
was a curve in the road and houses around and that she believed the
right hand side of the car struck her mother. The police officer
testified that the left headlight of the machine was broken, indicating
Campetto was asked some questions concerning her testimony at the
coroner's inquest, but there was no testimony introduced as taken
before the coroner in impeachment of her statements.
The trial court may have been of the opinion that the
testimony of one or both of these witnesses indicated contributory
negligence. The question as to whether or not these witnesses were
guilty of contributory negligence was not the issue involved in the
case. The question was whether or not the deceased was guilty of
contributory negligence. The trial court should have heard all the
evidence before entering its finding.
Plaintiff's interstate was rightfully at the point where
the accident occurred, proceeding over and along a path provided by
the park system, and had an equal right with the oncoming automobile
to use the highway at that particular point. The plaintiff in
operating his automobile through a public park on a Sunday afternoon
was required to take notice of the fact that people would be in the
park and particularly at the place in question. The fact that the
plaintiff may have been able to see the machine for 400 feet, in and
of itself does not constitute contributory negligence on her part in
proceeding across the highway under the circumstances involved in
this case. Under the view we take of the facts as they appear in
the testimony, the court should have heard all the evidence before
entering its finding.

A number of cases have been cited by counsel for plaintiff to the effect that a trial court should not direct a verdict at the end of plaintiff's evidence if there is any evidence on the part of the plaintiff which, standing alone, would support a verdict. In the case at bar, however, the trial was before the court without a jury. A motion to find for the defendant in the trial before the court without a jury raises only a question of law as to the sufficiency of the evidence to authorize a recovery. The allowance of the motion does not settle the issues of fact. In the view we take of this case, it cannot be said as a matter of law that the plaintiff cannot recover because that question involves the consideration of the facts. Helm v. Commercial Men's Ass'n., 279 Ill. 570. Under all the facts and circumstances in the case, in our opinion, it cannot be said, as a matter of law, that deceased was guilty of such negligence on her part as precluded a recovery.

For the reasons stated in this opinion the judgment of the Superior Court is reversed and the cause remanded for a new trial.

JUDGMENT REVERSED AND CAUSE REMANDED.

HEBEL AND HALL, JJ. CONCUR.

A further question has been asked by counsel for plaintiff
to the effect that a trial court should not direct a verdict in the
case of plaintiff's evidence if there is any evidence on the part of
the defendant. It is true, of course, that a trial court should not
direct a verdict in the case of the defendant, but the case at bar, however,
the case at bar, however, the trial was before the court without a
jury. A motion to find for the defendant in the trial before the
court without a jury raises only a question of law as to the suffi-
ciency of the evidence to authorize a recovery. The allowance of
the action does not settle the issue of fact. In the view we take
of this case, it cannot be said as a matter of law that the plaintiff
cannot recover because that question involves the consideration of
the facts. Wells v. Wells, 111 Ill. 270. What
all the facts and circumstances in the case, in our opinion, it cannot
be said as a matter of law, that recovery was barred at any time.
It is not a question of law.
For the reasons stated in this opinion the judgment of
the Superior Court is reversed and the cause remanded for a new trial.
JUDGMENT REVERSED AND CASE REMANDED.

RENEW AND MAIL, 11, 1900.

35940

THE 25 EAST DELAWARE BUILDING
CORPORATION, a corporation,

(Plaintiff) Appellee,

v.

JOHN ELLIOTT JENKINS,

(Defendant) Appellant.

118 A
APPEAL FROM THE

MUNICIPAL COURT

OF CHICAGO.

270 I.A. 633³

Opinion filed May 24, 1933

MR. JUSTICE HALL DELIVERED THE OPINION OF THE COURT.

This is an appeal from a judgment of the Municipal Court of Chicago for \$2,287.50 and costs entered in an action brought to recover for rent alleged to be due on a lease of an apartment made by plaintiff to defendant. On October 29th, 1928, plaintiff obtained judgment by confession in the amount mentioned. On petition of defendant the court ordered that the judgment be opened and leave given defendant to defend; that the petition of defendant stand as an affidavit of merits and that the judgment stand as security. After a hearing by the court, the court found that there was due plaintiff as of the date of the judgment the sum of \$2,287.50 - \$2,100.00 for rent and \$187.50 for attorney's fees, and allowed the judgment to stand as of October 29th, 1928.

The affidavit of merits charges that the plaintiff refused to furnish defendant with elevator service for his family and servant, or to furnish protection from the elements which made the premises unusable; that the plumbing in the bathrooms was unsanitary and unusable, and that the condition of the plumbing caused overflows in the bathrooms; that there were no facilities furnished for the removal of garbage; that the plaintiff refused to allow a servant of defendant to enter the premises and threatened such servant with violence; that because of the rain coming into the apartment, the plaster fell from the ceiling and quantities of water came into the rooms because the roof of the building was out of repair, and that the demised premises

2

1933

THE CHICAGO TRADING COMPANY, INC.

(Plaintiff)

v.

JOHN ELLIOTT LEWIS, JR.

(Defendant)

ALLIANCE TRADING COMPANY, INC.

(Plaintiff)

CHICAGO, ILL.

280 I.A. 633

Opinion filed May 24, 1933

MR. JUSTICE MALLINBACH THE CHIEF OF THE COURT.

This is an appeal from a judgment of the Municipal Court

of Chicago for \$1,207.50 and costs entered in an action brought by

plaintiff for rent alleged to be due on a lease of an apartment made

by defendant in default. On October 23rd, 1932, plaintiff obtained

judgment by confession in the amount mentioned. On petition of

defendant the court ordered that the judgment be vacated and leave

given defendant to defend; that the petition of defendant stand as

an affidavit of merits and that the judgment stand as security.

After a hearing by the court, the court found that there was due

plaintiff as of the date of the judgment the sum of \$1,207.50 -

\$3,100.00 for rent and \$127.50 for attorney's fees, and allowed

the judgment to stand as of October 23rd, 1932.

The affidavit of merits charges that the plaintiff refused

to furnish defendant with elevator service for his family and servants,

on to furnish protection from the elements which were the premises

unusable; that the plumbing in the bathroom was unsanitary and un-

usable, and that the condition of the plumbing caused overflow in

the bathroom; that there were no facilities furnished for the removal

of garbage; that the plaintiff refused to allow a servant of defendant

to enter the premises and threatened such servant with violence; that

because of the rain coming into the apartment, the plaster fell from

the ceiling and quantities of water came into the room because the

roof of the building was out of repair, and that the defendant premises

were altogether unfit, untenable and unsafe for occupancy.

It is claimed by defendant that the matters set up in the affidavit of merits amounted to a constructive eviction.

Various witnesses testified for defendant as to the condition of the premises, but most of the testimony adduced had to do with quarrels between the parties concerning a negro servant of defendant. Any material testimony of defendant's witnesses to the effect that the premises were out of repair and that the service agreed to be given defendant was withheld from defendant by plaintiff, is denied and declared to be untrue by plaintiff's witnesses.

A reading of the testimony as shown by the abstract, does not convince this court that the cause should be reversed and remanded for a new trial on account of the alleged conditions of the premises. The court saw and heard the witnesses, and had an opportunity to judge of and to pass upon their credibility.

The judgment is affirmed.

AFFIRMED.

WILSON, P.J. AND HEBEL, J. CONCUR.

were also... and made the... .

It is claimed by defendant that the matter set up in the

activity of matter amounted to a constructive violation.

Various witnesses testified for defendant as to the con-

dition of the... but most of the testimony... as to the

with... between the parties concerning a... of

defendant. Any material testimony of defendant's witnesses to the

effect that the premises were out of repair and that the services

... as to the... was... by plaintiff.

is denied and declared to be untrue by plaintiff's witnesses.

A reading of the testimony as shown by the exhibits.

does not convince this court that the same should be reversed and

remanded for a new trial on account of the alleged... of

the premises. The court saw and heard the witnesses, and had an

opportunity to judge of and to pass upon their credibility.

The judgment is affirmed.

APPROVED.

... ..

36032

HARIETTE L. MARTIN,

Defendant in Error,

v.

DR. ERNEST CHARLES MARTIN,

Plaintiff in Error.

WRIT OF ERROR TO

SUPERIOR COURT

270 I.A. 633⁴

COOK COUNTY.

Opinion filed May 24, 1933

MR. JUSTICE HALL DELIVERED THE OPINION OF THE COURT.

By this writ of error the defendant seeks the reversal of a decree for divorce. The decree provides for the payment of \$25.00 a week alimony to complainant. The parties were married October 28th, 1928, and lived together until February 22nd, 1930, when complainant ceased to live and cohabit with defendant. She charges in her bill that about the time of the separation she discovered that she had become infected with a venereal disease, for which she holds defendant responsible. Defendant denies the charge. The defendant is a physician, practicing his profession in Chicago Heights, Illinois.

The evidence about which there seems to be no controversy is that in the month of July or August, 1929, complainant became pregnant; that the parties lived together until February 22nd, 1930, at which time complainant gave birth to a child and informed her husband that he had infected her with a venereal disease, and for that reason she would not live with him any longer.

The complainant testified that after she had been pregnant for about three months, she became alarmed at her physical condition and called her husband's attention to it; that he gave her treatments, but forbade her to consult any other physician; that defendant finally sent complainant to a Doctor Giles, who examined her and found an abscess in her vagina, which he attributed to gonorrheal infection; that she went to a hospital on February 22nd, 1930, the date of the birth of her child, where a Doctor Jamison examined her and he also

WILLIAM L. MANTLE

Defendant in error

v.

THE BANK OF AMERICA

Plaintiff in error

SUPERIOR COURT

270 I.A. 683

DOCK CASE

Opinion filed May 24, 1932

THE JUSTICE SHALL RELY UPON THE OPINION OF THE COURT.

It is the duty of the defendant to seek the reversal of

a decree for divorce. The decree provided for the payment of \$25.00

a week alimony to complainant. The parties were married October 23rd

1928, and lived together until February 23rd, 1930, when complainant

ceased to live and cohabit with defendant. She charges in her bill

that about the time of the separation she discovered that she had

become infected with a venereal disease, for which she holds defendant

responsible. Defendant denies the charge. The defendant is a

physician, practicing his profession in Chicago Heights, Illinois.

The evidence about which there seems to be no controversy

is that in the month of July or August, 1929, complainant became

pregnant; that the parties lived together until February 23rd, 1930,

at which time complainant gave birth to a child and informed her

husband that he had infected her with a venereal disease, and for

that reason she would not live with him any longer.

The complainant testified that after she had been pregnant

for about three months, she became alarmed at her physical condition

and called her husband's attention to it; that he gave her treatment

but forbade her to consult any other physician; that defendant

finally sent complainant to a Doctor Office, who examined her and found

an abscess in her vagina, which he attributed to gonorrheal infection;

that she went to a hospital on February 23rd, 1930, the date of the

birth of her child, where a Doctor Jackson examined her and he also

informed her that she had a gonorrheal infection, which also infected the child's eyes; that the physician who attended her at childbirth was Doctor Santos, whom she employed at her husband's suggestion. She testified that she had had no sexual relation with any man other than her husband.

Doctor Santos testified to a conversation with complainant concerning defendant's wife's condition, and stated that defendant had told him that he, defendant, had the infection prior to his marriage, but that he had been cured. Defendant denied that he had ever had such an infection, and that he had had any such conversation with Doctor Santos. After the charge had been made by complainant, and after the bill in this case was filed, defendant had himself examined by another physician, who testified on behalf of defendant in the trial of the case, and stated that defendant was at that time free from any gonorrheal infection.

Doctors Jamison, Santos and Giles, who examined complainant at and before the birth of her child, each testified that upon examination they had found the gonorrheal infection in the complainant's vagina. Also it is in evidence that the baby had the same infection of its eyes.

On the question of the alimony, it is in evidence that defendant has had an extensive and lucrative practice as a physician, and the trial court fixed an amount based on such evidence. The chancellor saw and heard the witnesses, and apparently decided the case upon the evidence before him as he deemed himself justified in doing, and this court can see no reason for disturbing the decree of the Superior Court.

The decree is, therefore, affirmed.

AFFIRMED.

informed her that she had a gonorrheal infection, which also infected the child's eyes; that the physician who attended her at childbirth was Doctor Santos, whom she employed at her husband's suggestion. She testified that she had had no sexual relation with any man other than her husband.

Doctor Santos testified that he had examined defendant's wife's condition, and stated that defendant had said to him that he, defendant, had the infection prior to his marriage, but that he had been cured. Defendant denied that he had ever had such an infection, and that he had had any such conversation with Doctor Santos. After the charge had been read to the jury, and after the bill in this case was filed, defendant had himself examined by another physician, who testified on behalf of defendant in the trial of the case, and stated that defendant was at that time free from any gonorrheal infection.

Doctors Jamison, Santos and Allen, who examined defendant at and before the birth of her child, each testified that upon examination they had found the gonorrheal infection in the complainant's vagina. Also it is in evidence that the baby had the same infection of its eyes.

On the question of the alimony, it is in evidence that defendant has had an extensive and lucrative practice as a physician, and the trial court fixed an amount based on such evidence. The alimony was not based on the witness's testimony, but on the fact that upon the evidence before him he deemed himself justified in doing, and this court can see no reason for disturbing the decree of the superior court.

The decree is, therefore, affirmed.
AFFIRMED.
WILSON, P. J. AND KIRBY, J. CONCUR.

36041

THOMAS E. TALLMADGE and VERNON S.
WATSON, partners, doing business
as TALLMADGE AND WATSON,

Plaintiffs in Error,

v.

GEORGE F. NIXON,

Defendant in Error.

10
A
ERROR TO

MUNICIPAL COURT

OF CHICAGO.

270 I.A. 633⁵

Opinion filed May 24, 1933

MR. JUSTICE HALL DELIVERED THE OPINION OF THE COURT.

By this writ of error, a judgment for costs against plaintiffs in the Municipal Court of Chicago is sought to be reviewed. The suit is by plaintiff, an architect, against defendant on an alleged contract between the parties, by which it is charged that defendant agreed to pay plaintiff for services in preparing certain drawings and building plans for defendant. On a hearing in the lower court, the issues were found for defendant and the judgment for costs followed.

The only questions raised here are questions of fact. No bill of exceptions was filed in the case. The trial court signed and ordered filed a "Statement of Facts and Law for Review", which was filed here as part of the common law record. By order of this court, the "Statement of Facts and Law for Review" was stricken from the record of this court, and a motion to vacate the order striking such "Statement of Facts" from the record was denied. The entire case of plaintiff in error on appeal is predicated upon the "statement of facts and law" stricken from the record. Therefore, there is nothing for the court to review.

The judgment of the trial court is affirmed.

AFFIRMED.

WILSON, P.J. AND REBEL, J. CONCUR.

LEWIS J. TALLMAN and VERNON S.
ATTORNEYS, GEORGE BROWN
AS TALLMAN AND ATTORNEY

Plaintiffs in Error.

GEORGE F. KIRBY

Defendant in Error.

370 I.A. 633

Opinion filed May 24, 1933

MR. JUSTICE WILL DELIVER THE OPINION OF THE COURT.

By this writ of error, a judgment for costs against plaintiffs in the Municipal Court of Chicago is sought to be reviewed. The writ is by plaintiffs, an architect, against defendant on an alleged contract between the parties, by which it is charged that defendant agreed to pay plaintiffs for services in preparing certain drawings and building plans for defendant. On a hearing in the lower court, the lower court found for defendant and the judgment for costs followed.

The only question raised here is one of error of fact. No bill of exceptions was filed in the case. The trial court signed and returned a "Statement of Facts and Law for Review", which was filed here as part of the record for review. By order of this court, the "Statement of Facts and Law for Review" was stricken from the record of this court, and a notice to review the matter stipulated upon. "Statement of Facts" from the record was denied. The notice here of plaintiffs in error on appeal is predicated upon the "Statement of Facts and Law" returned from the court. Therefore, there is nothing for the court to review.

The judgment of the trial court is affirmed.

ASTOR.

36050

PRUDENTIAL LIFE INSURANCE CO. OF AMERICA,
a corporation,

(Complainant) Appellee,

v.

ARNOLD FENNER, et al.,

Defendants.

APPEAL FROM

CIRCUIT COURT

COOK COUNTY.

On Appeal of

ARNOLD FENNER,

(Defendant) Appellant.

270 I.A. 634¹

Opinion filed May 24, 1933

MR. JUSTICE HALL DELIVERED THE OPINION OF THE COURT.

On November 29, 1928, the Prudential Life Insurance Company of America filed a bill of complaint in the Circuit Court of Cook County in which it is alleged that it had issued an insurance policy on the life of one Anna Z. Traczowna, for the sum of \$5,000.00, with a provision for an additional \$5,000.00 benefit in case of accidental death, payable to her estate; that on August 18, 1926, the insured had executed an assignment of the policy to Arnold Fenner, one of the defendants; that on March 23, 1928, the insured died as the result of a pistol shot; that defendant, Arnold Fenner, started suit against complainant, claiming the entire proceeds of the policy, to wit; \$10,000.00; that one Josepha Wagner had begun a garnishment proceeding against complainant, based on a judgment against Arnold Fenner, and that the Northwestern Trust and Savings Bank, administrator of the estate of Anna Z. Traczowna, alias Anna Jaroszewicz, claimed the entire proceeds of the policy for and on behalf of three sisters and a brother of the deceased.

The bill prays that defendants be required to interplead, setting forth their respective claims, and that the court determine which is the rightful claimant. Arnold Fenner, Josepha Wagner,

APPEAL FROM

PROSECUTION FILED IN THE COURT OF THE DISTRICT OF COLUMBIA

A corporation

(Complaint) Special

THIRTY EIGHT

v.

ARNOLD KENNEDY, et al.

GOOD COMPANY

Defendants

On appeal of

ARNOLD KENNEDY,

(Defendant) Plaintiff

Opinion filed May 24, 1933

MR. JUSTICE HALL DELIVERED THE OPINION OF THE COURT.

On November 27, 1932, the Defendant filed a Complaint in the

of America filed a bill of complaint in the Circuit Court of Cook County in which it is alleged that it had issued an insurance policy on the life of one Anna K. Trosowicz, for the sum of \$2,000.00, with a provision for an additional \$5,000.00 benefit in case of accidental death, payable to her estate; that on August 10, 1932, the insured had executed an assignment of the policy to Arnold Kennedy, one of the defendants; that on March 24, 1933, the insured died as the result of a pistol shot; that defendant, Arnold Kennedy, started suit against complainant, claiming the entire proceeds of the policy, to wit: \$7,000.00; that one George Rogers had begun a proceeding against complainant, based on a judgment against Arnold Kennedy, and that the Northwestern Trust and Savings Bank, administrator of the estate of Anna K. Trosowicz, alias Anna Trosowicz, claimed the entire proceeds of the policy for and on behalf of three estates and a trust of the deceased.

The bill prays that defendants be required to interplead, setting forth their respective claims, and that the court determine what is its legal claim. Arnold Kennedy, George Rogers,

2701A.684

Werner Fenner, a brother of Arnold Fenner, and the Northwestern Trust and Savings Bank, administrator, were made parties defendant, and each filed an answer to the bill setting forth the respective claims. A cross bill was filed by the Northwestern Trust and Savings Bank, administrator, in and by which it averred that the assignment to Arnold Fenner was void, and that if not void it was given to secure a debt owed by the insured to Fenner. The administrator prayed that in the event the court should hold the assignment to be valid, in that it was made as security for a debt owed by Anna Z. Traczowna to Arnold Fenner, then and in that case that an accounting be ordered. The brother and sisters of the assured are presumably the moving parties in the suit, and among other allegations made on behalf of them in the cross bill is one to the effect that the assignment of the insurance policy was made in consideration of illicit sexual relations between Fenner and Anna Z. Traczowna, their sister, and is therefore, void. The Northwestern Trust and Savings Bank resigned as administrator and the Reliance Trust and Savings Bank, administrator de bonis non was substituted. The cause was referred to a Master in Chancery "to take testimony and to report his conclusions of law and fact thereon."

The complainant paid \$10,000.00, the amount of the insurance due under the terms of the policy, to the clerk of the Circuit Court, subject to the order of the court.

After an extensive hearing, the master reported and found the equities of the case to be with Arnold Fenner and recommended that an order be entered to the effect that out of the moneys deposited with the clerk of the court, the claim of Josepha Wagner for \$360.00 be paid, and that the balance, less the master's fees, be paid to Arnold Fenner. Objections and exceptions to the master's report were duly presented, and after a hearing the court overruled the master and decreed that the entire fund, less the master's fees, be

... a brother of Arnold Jenner, and the Northwestern
Trust and Savings Bank, administrator, was made parties defendant,
and each filed an answer to the bill setting forth the respective
claims. A cross bill was filed by the Northwestern Trust and
Savings Bank, administrator, in and by which it averred that the
assignment to Arnold Jenner was void, and that it was void it was
given to secure a debt owed by the insured to Jenner. The adminis-
trator prayed that in the event the court should hold the assignment
to be valid, in that it was made as security for a debt owed by
Jenner to the Northwestern Trust and Savings Bank, and in that case
accounting be ordered. The master and master of the insured are
presumably the moving parties in the suit, and among other things
it was made on behalf of them in the cross bill is one to the effect
that the assignment of the insurance policy was made in consideration
of illicit sexual relations between Jenner and Anna E. Tressner,
their sister, and is therefore, void. The Northwestern Trust and
Savings Bank resigned as administrator and the National Trust and
Savings Bank, administrator of Arnold Jenner was appointed. The same
was referred to a master in Chancery "to take testimony and to
report his conclusions of law and fact thereon."
The complainant paid \$50,000.00, the amount of the insurance
due under the terms of the policy, to the clerk of the Circuit Court,
subject to the order of the court.
After an extensive hearing, the master reported and found
the validity of the cross to be with Arnold Jenner and recommended
that an order be entered to the effect that out of the money deposited
with the clerk of the court, the claim of Joseph Wagner for \$50.00
be paid, and that the balance, less the master's fees, be paid to
Arnold Jenner. Contentions and conclusions as the master's report
were duly presented, and after a hearing the court overruled the
master and decreed that the entire fund, less the master's fees, be

paid to the Reliance Trust and Savings Bank, administrator de bonis non of the estate of Anna E. Traczowna. It is from this decree that the appeal herein is taken.

In complainant's presentation of its case on appeal, it is not denied that Anna E. Traczowna had assigned the insurance policy in question to the defendant, Arnold Fenner, and it is not denied that under the decisions of the Illinois courts she had the right to make such assignment, and that Fenner had the right to take under it. It is not claimed that the assignment was made under duress, there is no proof that any undue influence was used in procuring its execution, and there is no proof that any illicit relations existed between the parties. The proof shows that the assignment is in writing, and was made and executed in the office of the insurance company. There is no proof that there was anyone present at the time of the execution of the document other than Anna E. Traczowna and the agents of the insurance company. The assignment is in words and figures as follows:

ASSIGNMENT OF POLICY

For Value Received, I hereby assign and transfer unto Arnold Fenner of 1741 W. Washington Blvd., Chicago, the policy of insurance known as No. 5039713, issued by

THE PRUDENTIAL INSURANCE COMPANY OF AMERICA, upon the life of Anna E. Traczowna of 1450 W. Chicago Ave., Chicago, Ill., and all dividends, now due and which may hereafter accrue thereon, and all benefit and advantage to be had or derived therefrom, except any Total and Permanent Disability benefits in the form of a monthly income to the insured without deduction from the amount of insurance that may be provided by the terms of said policy; subject to the conditions of the said policy, and to the rules and regulations of said Company. This assignment is made expressly subject to the lien of the Company on said policy for any indebtedness of the insured or any prior assignee to said Company existing at the time this assignment is filed with said Company and in making settlement of the said policy there shall first be deducted all such indebtedness.

Each person executing this assignment represents to said Company that he (or she) has attained to majority according

paid to the Reliance Trust and Savings Bank, administrator of the estate of Anna E. Tresscow. It is from this source that the above person is taken.

In complainant's presentation of its case on appeal, it is not denied that Anna E. Tresscow had assigned the insurance policy in question to the defendant, Arnold Tenney, and it is not denied that under the decision of the Illinois courts she had the right to make such assignment, and that Tenney had the right to take what it is not claimed that the assignment was made under duress, there is no proof that any undue influence was used in procuring the assignment, and there is no proof that any illicit relations existed between the parties. The proof shows that the assignment is in writing, and was made and executed in the office of the insurance company. There is no proof that there was anyone present at the time of the execution of the document other than Anna E. Tresscow and the agents of the insurance company. The assignment is in words and figures as follows:

ASSIGNMENT OF POLICY

THE POLICY RECEIVED, I hereby assign and transfer unto Arnold Tenney of 1741 N. Washington Blvd., Chicago, the policy of insurance known as No. 1000012, issued by THE INDUSTRIAL INSURANCE COMPANY OF AMERICA, upon the life of Anna E. Tresscow of 1400 S. Dearborn Ave., Chicago, Ill., and all dividends, now due and which may hereafter become due, and all benefits and advantages to be paid or payable thereon, except any loan and interest thereon, to the order of a beneficiary named in the policy, without deduction first the amount of insurance that may be required by the terms of said policy, and so the conditions of the said policy, and so the rules and regulations of said company. This assignment is made expressly subject to the life of the company on said policy for any indebtedness of the insured or any other assignee to said company existing at the time this assignment is filed with said company and in making settlement of the said policy there shall first be deducted all such indebtedness.

Each person executing this assignment represents to said company that he (or she) has executed the assignment according

to the laws of the State or Province in which he (or she) resides, or that he (or she) is empowered by law to execute this form even though majority has not been attained.

Witness my hand and seal this 18th day of August, one thousand nine hundred and twenty six.

(Signed) Anna Z. Traczowna (SEAL)

I hereby certify that the above assignment was signed in my presence by the insured under the policy mentioned therein.

(Signed) F. M. Russell, Supt.
Manager, Superintendent, Assistant
Superintendent or Agency Organizer.

THE PRUDENTIAL INSURANCE COMPANY OF AMERICA,
in accordance with its rules, as stated above, has retained
the duplicate of this assignment.

(Signed) Edward D. Duffield

Per Mo

Newark N. J. August 23, 1926.

The evidence discloses that Anna Z. Traczowna was conducting a conservatory of music, and that she had employed Arnold Fenner to give lessons on the violin to her pupils, and that she had agreed to pay Fenner a salary of \$60.00 per week beginning March, 1922; that at or about the date of the assignment Anna Z. Traczowna had become indebted to Fenner for a considerable sum for salary due him, and that Fenner had advised her that he was about to leave her employ; that through the intercession of mutual friends, and at the urgent request of Anna Z. Traczowna, Fenner was induced to remain in her employ, and that she voluntarily and without any solicitation on Fenner's part, assigned to him all rights in the policy of insurance in question.

Among those testifying were Filbert M. Russell, Superintendent of the Prudential Insurance Company, whose name is attached to the assignment as a witness, and who certified thereon that it was signed by Anna Z. Traczowna in his presence; also Bruno Albert Reichel, a salesman employed by the insurance company. Russell was produced as a witness by the administrator, and Reichel by Arnold Fenner.

to the fact of the State of Texas in which he (or she) resides, or that he (or she) is employed by law to execute this form even though majority has not been attained.

Witness my hand and seal this 18th day of August, one thousand nine hundred and twenty six.

(Signed) Anna E. Truesome (State)
I hereby certify that the above assignment was signed in my presence by the insured under the policy mentioned therein.

(Signed) J. E. Marshall, Agent
Manager, Equitable Life Insurance Company of New York
Superintendent of Agency Operations

THE UNDERSIGNED HEREBY CERTIFY TO THE FACTS
IN CONNECTION WITH THE MATTER, AS SET FORTH, AND TESTIFY
TO THE VALIDITY OF THIS ASSIGNMENT.

(Signed) J. E. Marshall

For me

Witness my hand and seal this 18th day of August, 1926.

The evidence discloses that Anna E. Truesome was nonresiding a conservator of estate, and that she had employed Arnold Turner to give testimony as the victim of her rapine, and that she had agreed to pay Turner a salary of \$50.00 per week beginning March, 1926; that at or about the date of the assignment Anna E. Truesome had become inclined to Turner for a considerable sum for salary due him, and that Turner had advised her that he was about to leave her employ; that Turner the introduction of mutual friends, and at the request of Anna E. Truesome, Turner was induced to remain in her employ, and that she voluntarily and without any coercion or pressure signed the assignment to him all rights in the policy of insurance in question.

These facts testified were stated by J. E. Marshall, Agent of the Equitable Life Insurance Company, whose name is attached to the assignment as a witness, and who testified therein that it was signed by Anna E. Truesome in his presence; also that Marshall was induced as a witness by the administrator, and induced by Turner

Russell testified that in the month of August, 1926, Anna Z. Traczowna called at the office of the insurance company and stated to the witness in substance that she owed a music teacher a considerable sum of money, and that she desired to make sure he would be protected in case of her death, and for that purpose she desired to assign the insurance policy to Fenner; that she said nothing about the amount of the indebtedness until the witness questioned her, and that she then told the witness that at that time it amounted to \$2,000 or \$3,000. All the premiums on the insurance policy were paid by Anna Z. Traczowna.

Bruno Albert Reichel testified that as agent of the insurance company he had delivered the policy to Anna Z. Traczowna, collected the premiums when due, and that in about the month of August, 1926, he had a conversation with her at which time she told the witness that she was indebted to Fenner, her business partner. Reichel further testified that it was upon his advice that Anna Z. Traczowna made the assignment of the insurance policy to Fenner.

The policy was in the possession of Arnold Fenner at the time of the death of Anna Z. Traczowna, and it was he and his brother who made the proofs of her death to the insurance company.

The assignment was executed in August, 1926, the decedent died on March 28, 1928, Fenner remained with ^{her} as teacher until her death, and there is no evidence of any further payments by Anna Z. Traczowna to Fenner.

Several witnesses testified that Anna Z. Traczowna had stated to them that she felt greatly indebted to Fenner, and that she had made the assignment to Fenner of the entire interest in the insurance policy, and that in case of her death she desired him to have the entire amount of any money paid thereunder so that he might

Witness testified that in the month of August, 1935, Anna E. Tressown called at the office of the insurance company and stated to the witness in substance that she owed a certain sum of money, and that she desired to make some arrangement for the payment of the same, and for that purpose she desired to assign the insurance policy to Tressown; that she said nothing about the amount of the indebtedness until the witness mentioned her, and that she then told the witness that at that time it amounted to \$2,000 or \$2,500. All the premium on the insurance policy was paid by Anna E. Tressown.

Bruno Albert Schabel testified that he was agent of the insurance company he had delivered the policy to Anna E. Tressown, collected the premiums when due, and that in about the month of August, 1935, he had a conversation with her at which time she told the witness that she was indebted to Tressown, her business partner. Tressown further testified that it was upon his advice that Anna E. Tressown made the assignment of the insurance policy to Tressown.

The policy was in the possession of Arnold Tressown at the time of the death of Anna E. Tressown, and it was he and his brother who made the profits of her death to the insurance company.

The settlement was executed in August, 1935, the amount of \$2,000 or \$2,500, Tressown remained with her company until her death, and there is no evidence of any further payments by Anna E. Tressown to Tressown.

Several witnesses testified that Anna E. Tressown had stated to them that she felt greatly indebted to Tressown, and that she had made the assignment to Tressown of the entire interest in the insurance policy, and that in case of her death she desired him to have the entire amount of any money said Tressown might be entitled to.

continue to conduct the conservatory of music started by her. This evidence is not contradicted.

The important matter for this court to consider and determine is the intention of the assured, Anna E. Traczowna, at the time she executed the assignment of the policy to Fenner. The evidence, including the language used in the assignment itself, is to the effect that the woman intended that upon her death, Fenner should have the entire proceeds of the policy. The master saw and heard the witnesses, and had an opportunity to pass upon their credibility, and while his report and conclusions are not controlling, this court is of the opinion that in this case they should be given great consideration and credit.

The conclusion and judgment of this court, is that from the evidence adduced, it is apparent that in executing the assignment of the policy in question it was the intention of Anna E. Traczowna that upon her death the entire proceeds from the insurance policy should be paid to Arnold Fenner. It is the judgment of this court that after the payment of the Wagner claim and the master's fees herein, the balance of the fund deposited with the clerk of the Circuit Court by the Prudential Life Insurance Company of America on account of the policy of insurance in question, be paid to the defendant, Arnold Fenner, and it is ordered that the decree be reversed and the cause remanded with the direction to the Circuit Court that it enter a decree in conformity with this opinion.

REVERSED AND REMANDED
WITH DIRECTIONS.

WILSON, P.J. AND HEBEL, J. CONCUR.

continue to conduct the conservatory of annuity started by her. This evidence is not contradicted.

The important matter for this court to consider and deter-

mine is the intention of the assured, Anne K. Thompson, at the time she executed the assignment of the policy to Jenner. The

witness, including the language used in the assignment itself, is to the effect that the woman intended that upon her death, Jenner

should have the entire proceeds of the policy. The master saw and heard the witnesses, and had an opportunity to pass upon their

credibility, and while his report and conclusions are not controlling this court is of the opinion that in this case they should be given

great consideration and weight.

The conclusion and judgment of this court, as that from the evidence adduced, it is apparent that in executing the assignment

of the policy in question it was the intention of Anne K. Thompson that upon her death the entire proceeds from the insurance policy

should be paid to Arnold Jenner. It is the judgment of this court that after the payment of the policy claim and the master's loss

settlement, the balance of the fund deposited with the clerk of the Circuit Court by the Industrial Life Insurance Company of America

on account of the policy of insurance in question, be paid to the defendant, Arnold Jenner, and it is ordered that the decree be

reversed and the cause remanded with the direction to the Circuit Court that it enter a decree in conformity with this opinion.

RECORDED AND INDEXED
JULY 1890.

36068

MORRIS I. KAPLAN,

v.

IDA D. BURT,

On Appeal of
PAUL BROCCOLO, Conservator of the
Estate of IDA D. BURT, Insane,

Appellant,

v.

MORRIS I. KAPLAN and CENTRAL REPUBLIC
BANK AND TRUST COMPANY, a Corporation,

Appellees.

APPEAL FROM

MUNICIPAL COURT

OF CHICAGO.

270 I.A. 634²

Opinion filed May 24, 1933

MR. JUSTICE HALL DELIVERED THE OPINION OF THE COURT.

This is an appeal from an order of the Municipal Court of Chicago, denying the motion of Paul Broccolo, conservator of the estate of Ida D. Burt, insane, to set aside a judgment against defendant, Ida D. Burt, for \$1,000.00 and costs entered on August 31st, 1928, also to set aside a judgment in the same proceeding against the Central Trust Company of Illinois, successor to the Bank of America, garnishee, for the sum of \$1,047.50 and \$32.00 costs, entered July 17th, 1929, both judgments being in favor of plaintiff.

On May 22nd, 1928, Morris Kaplan filed suit in the Municipal Court of Chicago against defendant, Ida D. Burt, for the sum of \$1,000.00 for alleged services rendered as Attorney-at-law. On the same day he filed an affidavit for attachment, in which it was alleged that the defendant was a non-resident of Cook County, and that her address was unknown, that she could not be found, and that she was concealing herself so that process could not be served upon her. In addition, all the usual allegations contained in the affidavit of non-residence were set forth, and further that the affidavit was to be used for the purpose of procuring an attachment against

1938

ROBERT L. HARTMAN

v.

JOHN D. HUNT

CHICAGO, ILL.

CHICAGO, ILL.

IN SENATE OF ILLINOIS
JANUARY 11, 1938

REPORT

v.

ROBERT L. HARTMAN AND CENTRAL TRUST COMPANY
HARTMAN AND TRUST COMPANY, a corporation.

REPORT

Opinion filed May 24, 1938

MR. JUSTICE HALL DELIVERED THE OPINION OF THE COURT.

This is an appeal from an order of the Municipal Court of

Chicago, denying the motion of Paul Hecox, co-defendant of the

estate of the D. Hunt, deceased, to set aside a judgment against

defendant, the D. Hunt, for \$1,000.00 and costs entered on August

21st, 1938, also to set aside a judgment in the same proceeding against

the Central Trust Company of Illinois, successor to the Bank of

Chicago, for the sum of \$1,047.50 and \$23.00 costs, entered

July 19th, 1938, both judgments being in favor of plaintiff.

On May 23rd, 1938, Hecox began filed suit in the Municipal

Court of Chicago against defendant, the D. Hunt, for the sum of

\$1,000.00 for alleged services rendered as attorney-at-law. On the

same day he filed an affidavit for attachment, in which it was

alleged that the defendant was a non-resident of Cook County, and

that her address was unknown, that she could not be found, and that

she was concealing herself so that process could not be served upon

her. In addition, all the usual allegations contained in the affi-

davit of non-residence were set forth, and further that the affidavit

was to be used for the purpose of procuring an attachment against

the defendant. On the same day, the attachment issued and was served on the Bank of America, as garnishee. The Bank of America entered its appearance on May 29th, 1928, and on August 6th, 1928, the defendant, Ida D. Burt, by her attorney, filed an appearance and an affidavit of merits in and by which she denied liability.

On August 21st, 1928, a hearing was had before the court, on the statement of claim and affidavit of merits, the issues were found in favor of plaintiff and a judgment entered against the defendant for \$1,000.00 and costs of suit; also at the same time, the Bank of America, garnishee, was ordered to answer the attachment, which it did on September 10th, 1928, and stated that at that time there was due from the garnishee to Ida D. Burt a sum sufficient to pay the amount claimed by plaintiff. On September 28th, 1928, defendant's motion for a new trial was overruled. On June 24th, 1929, the Bank of America, garnishee, obtained leave to file an amended answer, and on June 24th, 1929, the Central Trust Company of Illinois, garnishee, with which the Bank of America, garnishee, had become consolidated, filed an amended answer, by which it alleged that prior to the service of the summons upon such garnishee, to wit: in the year 1925, Ida D. Burt had been declared to be of unsound mind, and that at the time of the entry of the judgment herein against said Ida D. Burt, no order had been entered restoring her to reason, but that subsequent to the entry of such judgment, through a proceeding in County Court of Cook County, she had been restored to reason, and that at the time of filing the supplemental answer, Ida D. Burt was legally competent and prayed that because of lack of jurisdiction over Ida D. Burt, the judgment entered herein was void, and that the garnishee be dismissed out of the cause.

On July 17th, 1929, the court ordered the supplemental answer of the garnishee stricken and entered judgment against the garnishee for \$1,047.50 and costs of the proceeding. Thereafter on July 27th,

the defendant. On the same day, the attachment issued and was served on the Bank of America, as garnishee. The Bank of America entered its appearance on May 27th, 1933, and on August 22nd, 1933, the defendant, Mrs. D. Hurt, by her attorney, filed an appearance and an affidavit of merits in and by which she denied liability. On August 22nd, 1933, a hearing was had before the court, on the statement of claim and affidavit of merits, the issues were found in favor of plaintiff and a judgment entered against the defendant for \$1,000.00 and costs of suit, also at the same time, the Bank of America, garnishee, was ordered to answer the attachment which it did on September 10th, 1933, and stated that at that time there was due from the garnishee to Mrs. D. Hurt a sum sufficient to pay the amount claimed by plaintiff. On September 22nd, 1933, defendant's motion for a new trial was overruled. On June 24th, 1933, the Bank of America, garnishee, obtained leave to file an amended answer, and on June 24th, 1933, the Circuit Court of Illinois, Chicago, with which the Bank of America, garnishee, had become consolidated, filed an amended answer, by which it alleged that prior to the service of the summons upon such garnishee, to wit: in the year 1932, Mrs. D. Hurt had been declared to be of unsound mind, and that at the time of the entry of the judgment herein against said Mrs. D. Hurt, no order had been entered declaring her to be insane, but that subsequent to the entry of such judgment, through a proceeding in County Court of Cook County, she had been declared to be insane, and that as the time of filing the supplemental answer, Mrs. D. Hurt was legally insane and beyond that because of lack of jurisdiction over her estate, the judgment entered therein was void, and that the garnishee be dismissed out of the case.

On July 17th, 1933, the court ordered the supplemental answer of the garnishee allowed and entered judgment against the garnishee for \$1,007.00 and costs of the proceeding. Thereafter on July 27th,

1929, the record shows that the judgment against the garnishee was satisfied in full.

On October 27th, 1930, there was filed in this cause by Paul Broccolo, conservator, (presumably under Section 89 of the Practice Act) a petition in which it is alleged among other things that the petitioner is the legally appointed and acting conservator of Ida D. Burt; that the proceedings in the Municipal Court of Chicago herein and heretofore recited were had; that at the time of the institution of the suit in the Municipal Court the defendant was insane; that on February 14th, 1914, she had been adjudged insane by the County Court of Cook County and was ordered to be and was committed to the State Hospital for the Insane at Dunning, Illinois; that on March 20th, 1929, an order was entered in the County Court of Cook County finding that she had been restored to sanity, when as a matter of fact on March 20th, 1929, she was still insane, and that on July 24th, 1929, after another hearing in the County Court of Cook County, she was again adjudged insane and was ordered committed to the State Hospital for the Insane at Jacksonville, Illinois, where she now is.

It is alleged in this petition that Ida D. Burt had and has a good defense to the action brought by plaintiff in that there was no legal contract entered between the parties because of the insanity of the defendant at the time of the making of the alleged contract for legal services, said to have been made between the parties, and because no legal services were ever rendered by plaintiff for defendant, Ida D. Burt, and that he never represented her in any suit or proceeding or any other matter. The petition prays that the judgments be quashed, the suits dismissed, and that plaintiff be ordered to return to the Central Trust Company of Illinois the sum of \$1,479.60, with interest thereon from July 16th, 1929, at the rate of 5% per annum.

1930, the record shows that the judgments against the defendant were
 satisfied in full.

On October 27th, 1930, there was filed in this cause by
 Paul Rosenberg, defendant, (petitioner) under section 90 of the

Illinois Act) a petition in which it is alleged among other things
 that the petitioner is the legally appointed and acting conservator

of the D. Hart; that the proceedings in the Municipal Court of Chicago
 herein and heretofore recited were had; that at the time of the

institution of the suit in the Municipal Court the defendant was
 insane; that on February 14th, 1914, she had been adjudged insane by

the County Court of Cook County and was ordered to be and was committed
 to the State Hospital for the Insane at Joliet, Illinois; that on

March 20th, 1930, an order was entered in the County Court of Cook
 County finding that she had been restored to sanity, when as a matter

of fact on March 20th, 1930, she was still insane, and that on July
 22nd, 1930, after another hearing in the County Court of Cook County,

she was again adjudged insane and was ordered committed to the
 State Hospital for the Insane at Jacksonville, Illinois, where she

now is.

It is alleged in this petition that the D. Hart had and has
 a good balance to the action brought by plaintiff in that there was

no legal contract entered between the parties because of the insanity
 of the defendant at the time of the making of the alleged contract

for legal services, said to have been made between the parties, and
 because no legal services were ever rendered by plaintiff for

defendant, the D. Hart, and that he never represented her in any suit
 or proceeding or any other matter. The petition prays that the judg-

ments be quashed, the suits dismissed, and that plaintiff be ordered
 to return to the County Court of Cook County of Illinois the sum of

\$1,000.00, with interest thereon from July 14th, 1930, at the rate
 of 10 per cent.

On March 3, 1932, the court entered an order denying the prayer of the petition, and it is from this order that this appeal is prosecuted.

In the record, there appears an affidavit by Louis W. Dembo to the effect that the defendant was charged with an assault with a deadly weapon on Morris I. Kaplan (presumably the plaintiff herein) on July 15th, 1929; that the cause came on for trial, was submitted to a jury, and that the jury found that at the time of the alleged assault, to wit; July 15th, 1929, Ida D. Burt was insane, and that she was acquitted of such charge.

The above all appears from the common law record filed herein.

After the common law record was filed in this court, an additional record was filed in the cause, containing what purports to be a bill of exceptions, which consists of the petition filed and the Dembo affidavit. In the certificate attached to the "bill of exceptions", the court recites, "which was all the evidence heard in that behalf." No further evidence (if the petition and affidavit are evidence) is shown to have been offered in support of the petition. From anything that appears in the record, neither the plaintiff nor the garnishee were given notice of any hearing to be had on the petition, nor any opportunity to present their defense, if they had one.

In Mitchell v. Kereckson, 280 Ill. App. 508, this court said:

"While appellant averred in her motion that the fact that the said Joseph Mitchell was insane at the time of the trial was not known to the court or the judge who presided at the trial, yet she offered no evidence in support thereof. That was an essential element and without proper proof thereof she would not be entitled to any relief under Section 89 of the Practice Act, Cahill's St. Ch. 110, Par. 89.

A motion under that section of the statute to set aside a judgment for an error of fact must set up and rely upon such fact or facts as do not appear upon the record and are unknown to the court, and which, if known, would have precluded the rendition of the judgment. People v. Noonan, 276 Ill. 430. The motion amounts to a declaration in the new suit to reverse or recall the judgment it is intended to

On March 2, 1933, the court entered an order denying the prayer of the petition, and it is from this order that this appeal is prosecuted. In the record, there appears an affidavit by Louis W. Brown as the officer that the defendant was charged with an assault with a deadly weapon on Martin L. Kaplan (unnecessarily the plaintiff herein) on July 18th, 1932; that the cause came on for trial, was submitted to a jury, and that the jury found that at the time of the alleged assault, to wit: July 18th, 1932, the W. Brown was insane, and that he was acquitted of each charge.

The court will require from the record the record filed herein. After the common law record was filed in this court, an additional record was filed in the cause, containing what purports to be a bill of exceptions, which consists of the petition filed and the home affidavit. In the affidavits attached to the bill of exceptions, the court recites, "which was all the evidence heard in that behalf." No further evidence (if the petition and affidavit are evidence) is shown to have been offered in support of the petition. From anything that appears in the record, neither the plaintiff nor the defendant were given notice of any hearing to be had on the petition, nor any opportunity to present their defense, if they had one. In Michael v. Michael, 200 Ill. App. 504, this court said:

"While appellant averred in her motion that the fact that the said Joseph Michael was insane at the time of the trial was not known to the court or the judge who presided at the trial, yet she offered no evidence in support thereof. That was a material element and without proper proof thereof she could not be entitled to any relief under section 15 of the Illinois Code, Chapter 11, Art. 10, Sec. 15."

A motion must show that section 15 of the statute is not satisfied for an error of fact must set up and rely upon such fact or facts as do not appear upon the record and the motion to the court, and since it shows, would have been granted the reversal of the judgment. Michael v. Michael, 200 Ill. App. 504. The motion amounts to a declaration in the law that in fact or really the judgment is in violation of

correct, and such suit is independent of the proceeding in which the judgment sought to be set aside was rendered. Harris v. Chicago House Brecking Co., 314 Ill. 500.

Appellant verified her motion but inasmuch as the motion stands as a declaration in a new suit, the verified motion is not evidence of the averments therein contained. The motion is not evidence, although sworn to, and its office is merely to point out the errors of fact on which relief is sought. 34 O. J. 401; Hicks v. Haywood, 4 Heisk. (Tenn.) 598. A sworn petition for a writ of error coram nobis is only a pleading in the case, and is not proof of the matters alleged in it. Johnson v. Straus Saddlery Co. 2 Ala. App. 300, 56 So. 755."

In Marquette National Fire Insurance Co., v. Minneapolis Fire & Marine Insurance Co., 233 Ill. App. 102 in passing upon the character of a proceeding brought under Section 89 of the Practice Act, this court said, page 106:

"The practice, upon the motion which has been substituted by the statute for the writ of error coram nobis, has been pointed out by the Supreme Court in a number of cases. Mitchell v. King, 187 Ill. 452; Cramer v. Illinois Commercial Men's Ass'n. 260 Ill. 516; People v. Noonan, 276 Ill. 430; Chapman v. North American Life Ins. Co., 292 Ill. 179; Marabla v. Mary Thompson Hospital, 309 Ill. 147. While the statute has substituted a motion for the common-law writ of error coram nobis, these cases hold that the essentials of the proceedings upon the motion are the same as they were at common law upon the writ. In the case last cited, the Supreme Court held that the errors of fact which could be made the basis of a writ of error at common law and which can now be made the basis of a motion to set aside and vacate a judgment under section 89 (Cahill's Ill. St. Ch. 110, Par. 89), were such as 'referred to the disability of parties, the incapacity of the plaintiffs to sue or the disability of the defendants to defend, such as infancy, coverture, death of one or more of the parties, death of a joint party, insanity. Any of these facts, if known to the court, would prevent the entry of a judgment, and it is to error arising out of lack of knowledge by the court of such facts that the writ of error coram nobis, or the motion which is its substitute, applies. * * * Tidd's Work on the Practice of the Courts of King's Bench and Common Pleas was first published in 1790, and no suggestion can be found in it or in the later editions, of which there have been many, that any other questions of fact than those of the character mentioned in that work, which have been already cited, constituted the basis for a writ of error coram nobis."

There are allegations to the effect that at the time of the making of the alleged contract, and at the time the judgment was entered, the defendant was insane, but not one word of proof of such

1. The following information is being furnished to you for your information only. It is not intended to be used for any other purpose.

[illegible][illegible][illegible]

There was discussion as to what time of the day the alleged contact, and at the time the judgment was rendered, the defendant was drunk, but not out of control as much.

fact, if it is and was a fact. The sworn petition upon which the court is asked to set aside the judgment appealed from is a pleading - a declaration - and is not evidence of any fact pleaded. Under the case presented by defendant, the court was fully justified in entering the order from which this appeal is taken.

The order appealed from is affirmed.

AFFIRMED.

WILSON, P.J. AND NEBEL, J. CONCUR.

The system described here is different.
 consisting of what I call "the system of the
 the year presented by the system, the system was fully justified in
 a description - and in the evidence of my last period. What
 most is found in the system is a description -
 then, it is not a test. The system is not a test.

36030

IRVING SUDIN, a minor by HYMAN SUDIN,
his next friend,

Appellee,

v.

BANKS LINKEN SUPPLY COMPANY, a
corporation,

Appellant.

APPEAL FROM

SUPERIOR COURT

COOK COUNTY.

270 I.A. 634³

Opinion filed May 24, 1933

MR. JUSTICE HALL DELIVERED THE OPINION OF THE COURT.

This is an appeal by defendant from a judgment of the Superior Court of Cook County for \$700.00, entered in a proceeding brought by plaintiff as next friend of Irving Sudin, a minor, against defendant, in which plaintiff sought to recover damages for injuries caused to Irving Sudin by the alleged negligence of defendant.

The declaration filed, consists of five counts, in which it is charged that defendant's truck, through the negligence of its driver, ran against and struck the plaintiff; that such act was wilful and wanton; that defendant's servant was negligent in not giving warning of its approach, as provided by statute; that defendant's servant was guilty of malicious conduct in not giving a warning of the approach of the truck and that defendant violated a statute, which provides that in approaching or passing a street car, the driver of a motor vehicle should not drive such vehicle to within ten feet of the running board of such street car. Defendant filed a plea of not guilty and a plea denying ownership of the truck, but the question of ownership is not raised on this appeal.

Irving Sudin testified that he was ten years of age at the time of the accident; that on the 20th of February, 1931, he was a passenger on a street car going north on Stony Island Avenue in the City of Chicago; that the street car stopped at the south side of 33rd street and the plaintiff alighted from the rear platform of the

IN RE: ESTATE OF ALVIN KARPIS, DECEASED
BY WILLIAM J. HARRIS, ADMINISTRATOR

CHANCERY COURT

Appellee

v.

BARBARA ALICE KARPIS, DECEASED
BY WILLIAM J. HARRIS, ADMINISTRATOR

CHANCERY COURT

270 I.A. 634

Opinion filed May 24, 1938

MR. JUSTICE HALL DELIVERED THE OPINION OF THE COURT.

This is an appeal by defendant from a judgment of the

Superior Court of Cook County for \$200.00, entered in a proceeding

brought by plaintiff as next friend of Irving Rubin, a minor, against

defendant, in which plaintiff sought to recover damages for injuries

caused to Irving Rubin by the alleged negligence of defendant.

The declaration filed, consists of five counts, in which

it is charged that defendant's driver, through the negligence of his

driver, ran against and struck the plaintiff; that such act was

willful and wanton; that defendant's servant was negligent in not

giving warning of the approach, as provided by statute; that defend-

ant's servant was guilty of malicious conduct in not giving a warning

of the approach of the truck and that defendant violated a statute,

which provides that in approaching or passing a street car, the

driver of a motor vehicle should not drive such vehicle so within ten

feet of the running board of such street car. Defendant filed a plea

of not guilty and a plea denying ownership of the truck, but the

question of ownership is not raised on this appeal.

Irving Rubin testified that he was ten years of age at the

time of the accident; that on the 30th of February, 1937, he was a

passenger on a street car going north on Stony Island Avenue in the

City of Chicago; that the street car stopped at the south side of

33rd Street and the plaintiff alighted from the rear platform of the

car on which he was a passenger, passed around the rear of the car, started west across Stony Island Avenue, and that as he reached the edge of the street car he stopped and looked both ways. He stated that at this time the truck coming south toward him, slowed down; that he proceeded across the street running, but that at this time the truck started going faster and struck him as he reached the west rail of the south bound track. He stated that he was first knocked about seventy five feet when the truck struck him the second time. He was taken to a hospital for treatment. He testified that his leg was injured so that it was necessary to put two pieces of iron on it extending to his toes to hold the leg straight, and that he had the irons on his leg for about two months.

On cross examination, the boy testified that when he first saw the truck it was slowing up on the north side of 33rd Street, and that at that time the distance from the automobile to him was the length of the car plus the width of 33rd Street; that he stopped a few seconds and looked, started to walk west across the west track, saw the truck coming fast and that he then started to run and was struck by the truck.

For the plaintiff, Joseph M. Wingo testified that he was standing in front of the second door south of 33rd Street on Cottage Grove Avenue, saw the boy alight from the street car, pass around the rear of the car and look up and down the street, and that at this time the truck was about fifty feet from the boy. He further testified that he shut his eyes when the truck hit the boy and saw no more until the boy was picked up. This witness also testified that he heard no warning sound from the truck.

For the defendant, Roy Hill, a watchman, testified that he saw the boy pass around the rear of an automobile following the car from which the boy had alighted, but that he did not again see the boy until the truck hit him.

car on which he was a passenger, passed around the rear of the car, started west across Stony Island Avenue, and that as he reached the edge of the street car he stopped and looked both ways. He stated that at this time the truck coming south toward him, slowed down; that he proceeded across the street running, but that at this time the truck started going faster and struck him as he reached the west rail of the south bound track. He stated that he was first knocked about seventy five feet when the truck struck him the second time. He was taken to a hospital for treatment. He testified that his leg was injured so that it was necessary to put two pieces of iron on it extending to his toes to hold the leg straight, and that he had the iron on his leg for about two months.

On cross examination, the boy testified that when he first saw the truck it was slowing up on the north side of 33rd Street, and that at that time the distance from the automobile to him was the length of the car plus the width of 33rd Street; that he stopped a few seconds and looked, started to walk west across the west track, and the truck coming east and that he then started to run and was struck by the truck.

For the plaintiff, Joseph M. King testified that he was standing in front of the second door south of 33rd Street on Cottage Grove Avenue, saw the boy alight from the street car, pass around the rear of the car and look up and down the street, and that at this time the truck was about fifty feet from the boy. He further testified that he shut his eyes when the truck hit the boy and saw as more until the boy was picked up. This witness also testified that he heard no warning sound from the truck.

For the defendant, Roy Mill, a watchman, testified that he saw the boy pass around the rear of an automobile following the car from which the boy had alighted, but that he did not again see the boy until the truck hit him.

The driver of the truck did not testify. Defendant produced other witnesses, none of whom saw the accident.

A physician testified on behalf of plaintiff that he treated the boy for a fracture of the leg and shock, and that the charge for his services was \$300.00.

In Mulligan v. Andel, 245 Ill. App. 132, this court said, page 139:

"A police officer alighted from a westbound street car at a street intersection where the car had stopped to receive and discharge passengers. He walked around the back end of the car and immediately on stepping from behind the car was struck by the corner of an eastbound car. It was contended that he was guilty of contributory negligence, because he did not stop, look or listen before going upon the track, and that the court should have directed a verdict for defendant. We held that under the evidence it was a question of fact for the jury. Stack v. East St. Louis & Suburban Ry. Co., 153 Ill. App. 613, and the judgment was affirmed in 245 Ill. 308."

The case was submitted to the jury, fairly. The jury saw and heard the witnesses, and this court can find nothing in the record which would justify a reversal. Therefore, the judgment of the Superior Court is affirmed.

AFFIRMED.

WILSON, P.J. AND NEBEL, J. CONCUR.

The driver of the truck did not testify. Defendant

produced other witnesses, none of whom saw the accident.

A physician testified on behalf of plaintiff that he

treated the boy for a fracture of the leg and ankle, and that the

charge for his services was \$300.00.

In William v. Ladd, 228 Ill. App. 123, this court said,

Page 120:

"A police officer testified from a vantage point
near the accident that the car had stopped
to receive and discharge passengers. He noticed around
the back end of the car and immediately on stepping from
the car was struck by the power of an automobile
car. It was contended that he was guilty of contributory
negligence, because he did not stop, look or listen before
crossing over the track, and that the court should have
dismissed a verdict for damages. He held that under
the evidence it was a question of fact for the jury.
Block v. Ladd, 228 Ill. App. 123, 124, 125.
Ill. and the judgment was affirmed in 228 Ill. 208."

The case was submitted to the jury. The jury saw

and heard the witnesses, and this court can find nothing in the

record which would justify a reversal. Therefore, the judgment

of the Circuit Court is affirmed.

ATTORNEYS.

WILLIAM J. LADD AND WALTER J. CONROY.

36108

MAY WANG,

Appellee,

v.

AJAX AUTO COMPANY, a
Corporation and WARNER BROS.
THEATRES, a corporation,

On Appeal of AJAX AUTO COMPANY,
a corporation,

Appellant.

14
17
APPEAL FROM

MUNICIPAL COURT

OF CHICAGO

270 I.A. 634⁴

Opinion filed May 24, 1933

MR. JUSTICE HALL DELIVERED THE OPINION OF THE COURT.

This is an appeal by Ajax Auto Company from a judgment of the Municipal Court of Chicago in a suit brought by plaintiff (appellee) against two corporations, the Ajax Auto Company and Warner Bros. Theatres, Inc.

Plaintiff's statement of claim alleges that the defendant, Warner Bros. Theatres, Inc., operates the Avalon Theatre in Chicago; that on November 29th, 1930, the Ajax Auto Company agreed with Warner Bros. Theatres, Inc., to deliver a certain automobile to the Avalon Theatre, in consideration for which the Avalon Theatre agreed to advertise the business of the Ajax Auto Company on the screen of the theatre, and by means of cards, circulars etc.; that the automobile was delivered to the theatre, and that the theatre distributed certain cards, coupons and circulars in the neighborhood of the theatre advertising that the automobile would be given away to some one of the patrons of the theatre under certain conditions; that plaintiff attended the theatre, received a coupon bearing a number, which she was informed, was the lucky number drawn in the raffle, and which entitled her to receive the automobile in question; that she was thereupon given a letter addressed to the defendant, Ajax Auto Company, directing the Ajax auto Company to deliver to plaintiff the automobile

MAY 24, 1933

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270 I.A. 634

Opinion filed May 24, 1933

THE COURT HAS DELIVERED THE OPINION OF THE COURT.

THIS IS AN APPEAL BY THE DEFENDANT FROM A JUDGMENT OF

THE CIRCUIT COURT OF CHICAGO IN A SUIT BROUGHT BY PLAINTIFF (APPELLEE) AGAINST THE DEFENDANT, THE JAX AUTO COMPANY, INC. AND OTHERS.

THEATRE, INC.

PLAINTIFF'S COMPLAINT OF THIS CASE SETS OUT THE FOLLOWING:

THAT THE JAX AUTO COMPANY, INC., DEFENDANT, OPERATES THE JAX THEATRE IN CHICAGO;

THAT ON NOVEMBER 22ND, 1932, THE JAX AUTO COMPANY AGREED WITH THEATRE, INC., TO DELIVER A CERTAIN AUTOMOBILE TO THE JAX

THEATRE, IN CONSIDERATION FOR WHICH THE JAX AUTO COMPANY AGREED TO ADVANCE

THE JAX AUTO COMPANY THE JAX AUTO COMPANY ON THE BASIS OF THE

THEATRE, AND BY REASON OF THE JAX AUTO COMPANY, THAT THE AUTOMOBILE

WAS DELIVERED TO THE THEATRE, AND THAT THE THEATRE DISTRIBUTED CERTAIN

COUPONS, COUPONS AND CIRCULARS IN THE NEIGHBORHOOD OF THE THEATRE

ADVISING THAT THE AUTOMOBILE WOULD BE GIVEN AWAY TO SOME ONE OF THE

PATRONS OF THE THEATRE UNDER CERTAIN CONDITIONS; THAT PLAINTIFF

ATTENDED THE THEATRE, RECEIVED A COUPON BEARING A NUMBER, WHICH SHE

WAS INFORMED, WAS THE ONLY NUMBER DRAWN IN THE RAFFLE, AND WHICH

ENTITLED HER TO RECEIVE THE AUTOMOBILE IN QUESTION; THAT SHE WAS THERE-

UPON GIVEN A LETTER ADDRESSING TO THE DEFENDANT, THE JAX AUTO COMPANY,

ADVISING THE JAX AUTO COMPANY TO DELIVER TO PLAINTIFF THE AUTOMOBILE

referred to, which the Ajax Auto Company refused to do, and plaintiff claims the sum of \$700.00, the value of the automobile.

Defendant, Ajax Auto Company admitted entering into the agreement with Warner Bros. Theatres, Inc., under the terms of which it was to deliver an automobile to Warner Bros. Theatres, Inc., under certain terms and conditions, but averred that the terms and conditions of the agreement had not been complied with, and that therefore it was under no obligation to deliver the automobile, and further, that at no time did the Ajax Auto Company have any agreement with any patron of the Avalon Theatre regarding or concerning an automobile.

Defendant, Warner Bros. Theatres, Inc., in its affidavit of merits, alleged that it entered into a contract for the delivery of the automobile to it, in consideration of certain advertising to be done by it on behalf of the Ajax Auto Company, the automobile to be given away to some patron of the Avalon Theatre in a raffle to be held, but that after it had performed its contract, the Ajax Auto Company refused to deliver the automobile as agreed. On March 8th, 1932, a trial was had before the court, resulting in a finding against the plaintiff as to Warner Bros. Theatres, Inc., and a finding against the Ajax Auto Company for the sum of \$700.00. Upon the record as made, it was proper for the court to determine whether either or both of the defendants were liable. Motions for a new trial and in arrest of judgment were made by the Ajax Auto Company. Both were overruled, and a judgment entered on March 8th, 1932, for plaintiff and against the Ajax Auto Company for the sum of \$700.00. On the same date, an appeal from this judgment by the Ajax Auto Company to the Appellate Court was prayed and allowed, upon the filing of an appeal bond for the sum of \$1,000.00 in 30 days, and a bill of exceptions in 60 days. An appeal bond was presented, approved and filed on April 15th, 1932. On May 27th, 1932, on motion of the plaintiff, the court entered an order dismissing Warner Bros. Theatres, Inc., and that this defendant

...which the Ajax Auto Company refused to do, and plaintiff
claims the sum of \$700.00, the value of the automobile.
Defendant, Ajax Auto Company admitted entering into the
agreement with Warner Bros. Theatre, Inc., under the terms of which
it was to deliver an automobile to Warner Bros. Theatre, Inc., under
certain terms and conditions, but averred that the terms and conditions
of the agreement had not been complied with, and that therefore it
was under no obligation to deliver the automobile, and further, that
at no time did the Ajax Auto Company have any agreement with any
person of the Warner Theatre regarding or concerning an automobile.
Defendant, Warner Bros. Theatre, Inc., in its affidavit
of denial, alleged that it entered into a contract for the delivery
of the automobile to it, in consideration of certain advertising to
be given by it on behalf of the Ajax Auto Company, the automobile to
be given away to some person of the Warner Theatre in a raffle to be
held, but that after it had performed its contract, the Ajax Auto
Company refused to deliver the automobile as agreed. On March 28th,
1933, a trial was had before the court, resulting in a finding against
the plaintiff as to Warner Bros. Theatre, Inc., and a finding against
the Ajax Auto Company for the sum of \$700.00. Upon the record as
made, it was proper for the court to determine whether either or both
of the defendants were liable. Motions for a new trial and in arrest
of judgment were made by the Ajax Auto Company. Both were overruled,
and a judgment entered on March 28th, 1933, for plaintiff and against
the Ajax Auto Company for the sum of \$700.00. On the same date, an
appeal from this judgment by the Ajax Auto Company to the appellate
court was taken and allowed, upon the filing of an appeal bond for
the sum of \$1,000.00 in 30 days, and a bill of exceptions in 30 days.
An appeal bond was presented, approved and filed on April 15th, 1933.
On May 27th, 1933, on motion of the plaintiff, the court entered an
order dissolving Warner Bros. Theatre, Inc., and the said defendant

have judgment as in case of non-suit for costs.

On May 27th, 1932, when this order was entered, the appeal bond of defendant, Ajax Auto Company, on the appeal from the judgment entered March 8th, 1932, had been approved and filed so that at that time, the Municipal Court had lost jurisdiction.

From the record, it appears that in consideration of advertising to be done by defendant, Warner Bros. Theatres, Inc., the car in question was delivered by the Ajax Auto Company to Warner Bros. Theatres, Inc., at the Avalon Theatre, under an agreement between the Ajax Auto Company and Warner Bros. Theatres, Inc.; that the car was to be given to a lucky patron of the Avalon Theatre who might draw the winning number in a raffle to be held at the theatre; that the raffle and drawing were held; that at this time the car was in the possession of Warner Bros. Theatres, Inc.; that plaintiff drew the number which entitled her to the car; that at this time the car was on the stage of theatre, and that plaintiff was notified that hers' was the winning number, and that she was also there informed by Mr. J. S. Weber, the Sales Manager of the Ajax Auto Company and others that she had won the car, and that it belonged to her. Plaintiff testified that at this time she was given a letter by the manager of the theatre, addressed to the Ajax Auto Co., notifying the Ajax Auto Company that plaintiff was the winner of the car. This letter is shown in the record. The plaintiff further testified that Fred E. Patterson, the president and manager of the Ajax Auto Company, and Weber, its salesman, told her that the car needed care, that she would have difficulty in getting the car out of the theatre door and further that the Ajax Auto Company desired to display it for a week or ten days and asked her to allow the Ajax Auto Company to take it, which she did, and that she, plaintiff, could have the car after that.

same judgment as in case of non-suit for costs.

On May 27th, 1933, when this order was entered, the appeal
bench of defendant, Ajax Auto Company, on the appeal from the judgment
entered March 23d, 1933, had been approved and filed so that at that
time, the judgment could not have been reversed.

From the record, it appears that in consideration of adver-
sity to be done by defendant, Theater, Inc., the
order in question was delivered by the Ajax Auto Company to Theater, Inc.
Theater, Inc., at the Theater, under an agreement between
the Ajax Auto Company and Theater, Inc., that the car
was to be given to a lucky patron of the Theater who might
draw the winning number in a raffle to be held at the Theater; that
the raffle and drawing were held and at this time the car was in
the possession of Theater, Inc., and it is distinctly stated
the amount which was paid for the car at this time for the
car on the stage of Theater, Inc., and that Theater, Inc., was
paid for the winning number, and that the car was then delivered
to Mr. J. B. Brown, the sales manager of the Ajax Auto Company and
admits that she had not the car, and that it belonged to her. This
fact testified to at this time was given a letter by the
manager of the Theater, addressed to the Ajax Auto Co., notifying
the Ajax Auto Company that the car was the winner of the car. This
letter is shown in the record. The distinctly testified
that that is, however, the position and manager of the Ajax Auto
Company, and that, its testimony, told her that the car was
that she would have difficulty in getting the car out of the
company's lot and further that the Ajax Auto Company desired to
allow it for a year or two more and asked her to allow the Ajax
Auto Company to take it, which she did, and that was, distinctly,
could have the car after that.

Both Patterson and Weber testified on behalf of the defendant, Ajax Auto Company, and neither denied the statements alleged to have been made by them to the plaintiff - that she had won the car in the raffle, that with her permission it would be exhibited for a time, and that it would then be delivered to her. Their statements amounted to an admission of ownership of the car by the plaintiff.

Plaintiff further testified that when she called upon defendant, Ajax Auto Company, she was refused the car, for the reason as was stated to her, that a disagreement had been had between this institution and Warner Bros. Theatres, Inc., with which, of course, she was not concerned. It is in evidence that defendant sold the car for \$700.00, the amount of the judgment. The car in question was delivered to the Avalon Theatre by defendant, Ajax Auto Company, and after the drawing plaintiff was notified by all the parties, including the agents of the Ajax Auto Company, that the car belonged to her, and from that moment the title and the right to the possession of it were in plaintiff. By a subterfuge, the defendants obtained possession of the car, sold it, and the plaintiff has an undoubted right to recover its value from defendants.

We are of the opinion that the trial court was neither in error in its finding, nor in entering judgment. The judgment of the Municipal Court is affirmed.

AFFIRMED.

WILSON, P.J. AND HERBELJ. CONCUR.

John Peterson and Peter testified on behalf of the

defendant, John Auto Company, and without seeing the witnesses

alleged to have been made by them to the plaintiff - that she had

won the car in the raffle, that with her permission it would be

exhibited for a time, and that it would then be delivered to her.

Their statements amounted to an admission of ownership of the car

by the plaintiff.

Plaintiff further testified that when she called upon

defendant, John Auto Company, she was refused the car, and the reason

as was stated to her, that a disagreement had been had between this

institution and John Auto Company, Inc., with which, of course,

she was not concerned. It is in evidence that defendant said the

car for \$700.00, the amount of the judgment. The car in question

was delivered to the John Auto Company by defendant, John Auto Company,

and after the hearing plaintiff was notified by all the parties,

including the agents of the John Auto Company, that the car belonged

to her, and from that moment the title and the right to the posses-

ion of it were in plaintiff. By a subsequent, the defendant

obtained possession of the car, sold it, and the plaintiff has an

undoubted right to recover the value from defendant.

We are of the opinion that the trial court was without

in error in its finding, not in entering judgment. The judgment of

the Municipal Court is affirmed.

WITNESSED my hand and seal of office at the City of Chicago, Illinois,

this 1st day of June, 1907.

JOHN A. HARRIS, Clerk of the Municipal Court.

JOHN A. HARRIS, Clerk of the Municipal Court.

JOHN A. HARRIS, Clerk of the Municipal Court.

JOHN A. HARRIS, Clerk of the Municipal Court.

36118

WILLIAM FRANDREIS,

Appellee,

v.

MUTUAL BENEFIT AND AID SOCIETY,
a corporation,

Appellant.

115
APPEAL FROM

MUNICIPAL COURT

OF CHICAGO.

270 I.A. 634⁵

Opinion filed May 24, 1933

MR. JUSTICE HALL DELIVERED THE OPINION OF THE COURT

This is an appeal from a judgment of the Municipal Court of Chicago against defendant for the sum of \$100.00. Plaintiff's statement of claim alleges that plaintiff is a member in good standing of Section 38 of the Mutual Benefit and Aid Society, and that he has paid his dues and is in good standing in the society; that he applied to the physician in the district, in which plaintiff resided, for medical aid, to which plaintiff, as a member of such society, claimed to have been entitled; that the ailment for which he sought treatment was a hernia or rupture; that he so informed the society physician and requested that he perform an operation, and that such physician refused to operate. The statement of claim further recites that plaintiff then consulted a physician not connected with the society, and was informed by the latter physician that an operation was necessary; that this latter physician performed an operation, and that plaintiff was compelled to pay for such operation the sum of \$163.00, which amount plaintiff seeks to recover from defendant.

In its affidavit of merits, defendant denies liability, and asserts that under the by-laws of defendant society, to which plaintiff acquiesced when he became a member thereof, plaintiff was only entitled to treatment by a physician selected by the society, and that if he employed another physician, he did so on his own responsibility and at his own expense. The purpose of the organization is to furnish medical aid to its members under its rules and regulations.

WILLIAM FREDERICKS

Appellee

v.

MUTUAL BENEFIT AND AID SOCIETY,
a corporation

Appellant

MUNICIPAL COURT

OF CALIFORNIA

270 I.A. 684

Opinion filed May 24, 1933

MR. JUSTICE HALL DELIVERED THE OPINION OF THE COURT

This is an appeal from a judgment of the Municipal Court

of Chicago against defendant for the sum of \$100.00, plaintiff.

Statement of claim alleged that plaintiff is a member in good stand-

ing of section 28 of the Mutual Benefit and Aid Society, and that

he has paid his dues and is in good standing in the society; that he

applied to the physician in the district, in whom plaintiff wanted

for medical aid, to which plaintiff, as a member of such society,

claimed to have been entitled; that the amount for which he sought

treatment was a benefit or reward; that he so informed the society

physician and requested that he perform an operation, and that such

physician refused to operate. The statement of claim further recites

that plaintiff then consulted a physician not connected with the

society, and was informed by the latter physician that an operation

was necessary; that this latter physician performed an operation,

and that plaintiff was compelled to pay for such operation the sum of

\$100.00, which amount plaintiff seeks to recover from defendant.

In its affidavit of merits, defendant denies liability,

and asserts that under the by-laws of defendant society, to which

plaintiff belonged when he became a member thereof, plaintiff was

only entitled to treatment by a physician selected by the society,

and that if he employed another physician, he did so on his own respon-

sibility and at his own expense. The purpose of the organization is

to furnish medical aid to its members under its rules and regulations.

The rules of the organization are as follows:

Art. I. General Rules.

Sec. 1. The Board of Administration shall on the 1st day of May in each year divide the society into districts, which shall be known as, "Free Medical Service Districts."

Sec. 2. The Board of Administration shall on May 1 of each year designate and appoint for each district a duly licensed physician and surgeon.

Sec. 3. The name, address (residence and office), telephone and office hours of each district doctor and also the boundaries of the respective districts shall be published in each issue of the official organ of the society.

Art. II. Rights of Members.

Sec. 1. Every member of the society shall be entitled to receive free medical service including service for acute and chronic social diseases, and also including general surgical operations.

Sec. 2. Every member shall have the right to call on the physician appointed for his respective district, at the office of said physician for examination and treatment during the regular daily hours of said physician. In case of sudden illness, or accident, or such illness which incapacitates the member from calling at the office of the physician, the member shall have the right to demand the physician to call at his home at any time during the day or night.

Sec. 3. Members residing outside of the Free Medical District shall also be entitled to a free medical service at the office of the physician, but shall not have the right to demand that the physician make housecalls.

Sec. 4. In case of emergency, the member may call on the nearest society physician for first aid, but thereafter must submit to treatment by the physician appointed for his respective district.

Sec. 5. In the event that hospital treatment shall become necessary, the member may choose any hospital where the physician appointed for his district is admitted to practice.

Sec. 6. Any grievances or complaints on the part of the member respecting treatment by the society's physician, must notify the office of the society, stating their reasons in writing.

Art. III. Duties of Members.

Sec. 1. Members must acquaint themselves with the boundaries of the district in which they reside, and also

The rules of the organization are as follows:

ART. I. GENERAL RULES.

Sec. 1. The Board of Administration shall on the first day of May in each year divide the society into districts, which shall be known as "First Medical District," "Second Medical District," etc.

Sec. 2. The Board of Administration shall on May 1 of each year designate and appoint for each district a physician and surgeon, who shall be known as "District Physician and Surgeon."

Sec. 3. The name, address (residence and office), telephone and office hours of each district physician and surgeon shall be published in each issue of the official organ of the society.

ART. II. RIGHTS OF MEMBERS.

Sec. 1. Every member of the society shall be entitled to receive two medical services including services for acute and chronic general diseases, and also including general surgical operations.

Sec. 2. Every member shall have the right to call on the physician appointed for his respective district at the office of said physician for examination and treatment during the regular daily hours of said physician. In case of sudden illness, or accident, or condition of such illness which requires the member from calling at the office of the physician, the member shall have the right to demand the physician to call at his home at any time during the day or night.

Sec. 3. Members residing outside of the two Medical Districts shall also be entitled to a free medical service at the office of the physician, but shall not have the right to demand that the physician make house calls.

Sec. 4. In case of emergency, the member may call on the nearest available physician for first aid, but thereafter must submit to treatment by the physician appointed for his respective district.

Sec. 5. In the event that hospital treatment shall become necessary, the member may choose any hospital where the physician appointed for his district is admitted to practice.

Sec. 6. Any physician or oculist on the part of the member requesting treatment by the society's physician, must notify the office of the society, stating their reasons in writing.

ART. III. DUTIES OF MEMBERS.

Sec. 1. Members must appoint themselves with the boundaries of the district in which they reside, and also

with the location and office hours of the respective district physician.

Sec. 2. The free medical service herein provided shall be furnished only by the physician appointed for the respective districts. Members engaging the service of any other physician including physician appointed by the society for districts other than the district in which the members reside, are obliged to pay the expenses and charges of such other physician, and the society shall in no case be responsible for the payment of such services.

Sec. 3. Members whose physical condition permits them to visit the office of the physician, must do so, and shall not expect or request the physician to call at their homes under such circumstances.

Sec. 4. All bandages, medical prescriptions, hospital fees and laboratory examinations must be paid for by the member, and are not included in the free medical service. Expenses incurred for the services of specialists or special treatments must also be paid by the member.

Art. IV. General Rules for Society Physicians.

Sec. 1. Recommendations of names of physicians to be appointed by the Board of Administration must be received by the Secretary of the Society not later than the March meeting of the Board of Administration.

Sec. 2. The compensation to be paid to the physicians for the free medical service shall be stipulated and agreed upon by the Board of Administration before contracting with any physician for such services.

Sec. 3. The Board of Administration shall appoint a committee to be known as the "Doctors' Committee," and all grievances and complaints of members against any society physician, or of any physician against a member, shall be referred to said committee for decision.

Art. V. Duties of Society Physicians.

Sec. 1. Every physician appointed by the society shall provide an office centrally located in his district, and shall provide for certain definite office hours, during the day and evening on every day, except Sunday.

Sec. 2. Every such physician, upon request, shall make all necessary house or hospital calls.

Sec. 3. Said physician shall perform, free of charge all necessary general surgical operations upon members residing in their respective districts.

Sec. 4. It shall be the duty of said physician, upon request by the Financial Secretary of the society, to visit and examine sick members residing in other than their own districts, and shall make reports of their findings to the society.

with the location and office hours of the respective district physician.

Sec. 3. The three medical services herein provided shall be furnished only by the physician appointed for the respective district. Members engaging the services of any other physician including medical students, shall be liable for the difference between the district fee and the service fee, and shall be held to pay the expenses and charges of such other physician, and the society shall be responsible for the payment of such services.

Sec. 4. Members whose physical condition permits them to visit the office of the physician, must so do, and shall not request or request the physician to call at their homes except such emergencies.

Sec. 5. All members, medical practitioners, students and laboratory assistants must be paid for by the society, and are included in the three medical services. Expenses incurred for the services of specialists or specialists located in the city of the society.

ART. II. GENERAL RULES FOR SOCIETY PHYSICIANS.

Sec. 1. Recommendations of names of physicians to be appointed by the society of administration must be received by the secretary of the society not later than the first meeting of the board of administration.

Sec. 2. The recommendation to be sent to the physicians for the three medical services shall be furnished and agreed upon by the board of administration before submitting them to the physician for each service.

Sec. 3. The board of administration shall appoint a committee to be known as the "Personnel Committee", and all members and consultants of the society shall be notified of all decisions of the committee.

ART. V. Duties of Society Physicians.

Sec. 1. Every physician appointed by the society shall provide an office centrally located in his district, and shall provide for certain definite office hours, during the day and evening on every day, except Sunday.

Sec. 2. Every such physician, upon request, shall make all necessary home or hospital calls.

Sec. 3. Each physician shall perform free of charge all necessary general medical operations upon members residing in their respective districts.

Sec. 4. It shall be the duty of each physician, upon request of the financial committee of the society, to visit and examine sick members residing in their own districts, and shall make reports of their findings to the society.

Sec. 5. In the event that any physician appointed by the society shall for any reason be unable to perform the services required of him, then such physician shall provide a substitute physician acceptable to the society. All charges of such substitute physician shall be borne and paid for by the society physician and not by the society.

Sec. 8. Every physician so appointed by the society is obliged to render and give first aid to any member of any district in the event of accident or emergency, and shall treat such member until such time as the member may be removed to the respective district in which such member resides.

It appears from the evidence that in the month of June, 1930, plaintiff, who is a member of defendant society, called on Doctor F. Knoepfler, one of the regularly appointed physicians of the society, and assigned to the district in which plaintiff resided, for examination, and that plaintiff was informed by the doctor that he had a rupture, or hernia; that the physician informed plaintiff that the rupture was reducible and that an operation was unnecessary. This physician also testified that he did not refuse to operate. Thereafter, plaintiff employed Doctor Theodore Schaps, who performed an operation on plaintiff, and it is for the latter physician's charges that the claim is made against defendant.

Plaintiff voluntarily became a member of the defendant society, whose rules provide that "members engaging the services of any other physician including physician appointed by the society for districts other than the district in which the members reside, are obliged to pay the expenses and charges of such other physician, and the society shall in no case be responsible for the payment of such services."

The by-laws of the society are a part of the contract between plaintiff and defendant for the furnishing of medical services to the defendant. There is nothing in the agreement to suggest that a member who is dissatisfied with the advice of the society's physician as to treatment, may select a physician of the member's own choosing, and that the society is under any obligation to pay for the services of such physician. On the contrary, the very opposite is expressed in the by-laws. Therefore, there is no legal basis for the finding of the court below, and the judgment is reversed.

REVERSED.

NEBEL, J. CONCURS, WILSON, F.J. DISSENTING.

[illegible]

Section 2. Every individual so registered by the society is entitled to receive and give their aid to any member of any district in the event of sickness or emergency, and shall have such member until such time as the member may be removed as the Executive Board is also made member.

It appears from the evidence that in the month of June, 1950,

plaintiff, who is a member of defendant society, called on Doctor F. Knapp, one of the regularly appointed physicians of the society, and assigned to the district in which plaintiff resided, for examination, and that plaintiff was informed by the doctor that he had a rupture, or hernia; that the physician informed plaintiff that the rupture was reducible and that an operation was unnecessary. This physician also testified that he did not refuse to operate. The plaintiff employed Doctor Theodore Nelson, who performed an operation on plaintiff, and is in for the latter physician's charges that the same is well advised defendant.

plaintiff voluntarily became a member of the defendant society, and for that purpose provided and caused to be provided the services of any other physician or hospital furnished by the society for the district other than the district in which the members reside, and the society shall be liable to pay the expenses and charges of such other physician, and the society shall be no more responsible for the payment of such services. The terms of the society and a part of the contract between plaintiff and defendant for the furnishing of medical services to the defendant. There is nothing in the agreement so explicit that a member who is dissatisfied with the advice of the society's physician is so dissatisfied, and without a physician of the member's own choosing, and that the society is under any obligation to pay for the services of such physician. On the contrary, the very opposite is intended in the contract. Therefore, there is no legal basis for the finding of the court below, and the judgment is reversed.

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F. F. SMITH WIRE & IRON WORKS,

Appellee,

v.

DAVID LASKEY, SAMUEL LASKEY,
et al.,

Appellants.

116
APPEAL FROM

SUPERIOR COURT

OF COOK COUNTY.

270 I.A. 635¹

Opinion filed May 24, 1933

MR. JUSTICE HALL DELIVERED THE OPINION OF THE COURT.

This is an appeal from a decree of the Superior Court of Cook County in favor of complainant in a proceeding in chancery brought to foreclose a mechanic's lien.

The bill charges that defendant, David Laskey, is the owner of certain described real estate in the city of Chicago; that on the 7th day of August, 1930, David Laskey, doing business as Laskey and Laskey, entered into a contract with complainant for the manufacture and installation of certain iron and steel work upon a building then being erected on the premises described; that by the terms of the contract, defendant had agreed to pay complainant the sum of \$1,637.60 for such work; that complainant completed the work agreed to be done on or about December 1st, 1930; that the work enhanced the value of the property described, and that the amount agreed to be paid therefor by the terms of the contract was then due and payable. It is further alleged that on January 9th, 1931, complainant caused to be filed in the office of the clerk of the Circuit Court of Cook County a claim and statement for a mechanic's lien on the premises described for the amount alleged to be due. The bill prays for an accounting; that defendant be ordered to pay the amount due within a date to be fixed by the court, and that in default of payment, the premises be ordered sold to satisfy the claim and lien.

Defendants answered, denying that the work had been completed as agreed; denied that the work done by complainants enhanced the

IN SENATE
JANUARY 24, 1933

REPORT

DAVID L. BROWN, SENATOR

REPORT

OF SENATE

2501 A. 685

Opinion filed May 24, 1933

MR. JUSTICE HALL DELIVERED THE OPINION OF THE COURT.

This is an appeal from a decree of the Superior Court of Cook County in favor of complainant in a proceeding in summary brought to foreclose a mechanic's lien.

The bill charges that defendant, David L. Brown, is the owner of certain described real estate in the city of Chicago; that on the 1st day of August, 1932, David L. Brown, being plaintiff in error, entered into a contract with complainant for the construction and installation of certain iron and steel work upon a building then being erected on the premises described; that by the terms of the contract, defendant had agreed to pay complainant the sum of \$1,637.50 for such work; that complainant completed the work agreed to be done on or about December 1st, 1932; that the work enhanced the value of the property described, and that the amount agreed to be paid therefor by the terms of the contract was then due and payable. It is further alleged that on January 25th, 1933, complainant caused to be filed in the office of the clerk of the circuit court of Cook County a claim and statement for a mechanic's lien on the premises described for the amount alleged to be due. The bill prays for an accounting; that defendant be ordered to pay the amount due complainant as set forth by the court, and that in default of payment, the premises be ordered sold to satisfy the claim and lien.

Defendants answered, denying that the work had been completed as agreed; contended that the work done by complainant enhanced the

value of the property; that the defendants are indebted to complainant in any amount, and denied that at any time defendant had notice that a mechanic's lien had been served upon defendants as provided by law. To the answer a replication was filed, and upon the bill, answer and replication, the cause was referred to a Master in Chancery "to take testimony herein according to law." On January 10th, 1931, by leave of court, an amended bill of complaint was filed containing substantially the same allegations as those contained in the original bill, and prayed for the same relief. The court ordered that the answer filed stand as the answer to the amended bill. After extended hearings before the Master, and after many witnesses had testified on behalf of the respective parties to the suit, the Master on March 2nd, 1932, reported his findings, and recommended that a decree be entered for the sum of \$1,757.00, the amount found by him to be due, and for which complainant was entitled to a lien on the premises described in the bill of complaint. After a hearing by the court on exceptions to the master's report, the decree appealed from was entered. The contract upon which the action is predicated, is as follows:

"F. P. Smith Wire and Iron Works

Chicago, August 7th, 1930.

This Contract dated August 7th, 1930 by and between F. P. Smith Wire and Iron Works, Inc., 2340 Clybourn Ave., Chicago, Illinois, hereinafter known as the ornamental iron contractor, and Laskey & Laskey, hereinafter known as the general contractor, agree to the following:

F. P. Smith Wire and Iron Works, Inc., is to furnish and erect the ornamental iron and etc. for building to be erected at 52 East Oak St., Chicago, Illinois, as follows:

Steel store front including second floor windows, door framing and door transoms to be made up of steel framing and J. G. Braun ornamental pattern moulding, similar to drawings submitted today by ornamental iron contractor for 1902-04 South Michigan Avenue. All work is to be manufactured and installed ready to receive glass.

Ornamental radiator grille in first floor vestibule.

One Front steel stairs as per plan to receive terrazzo risers and tread.

Stair railing brackets.

Door openings are to be made to receive all door hardware.

Drawings are to be submitted to the general contractor by the ornamental iron contractor for the approval of the general contractor, as to construction, design, dimensions, etc.

Work is to be done within a reasonable length of time and in a first-class workmanlike manner.

All of the above the ornamental contractor agrees to furnish and install for the sum of Sixteen Hundred and Ninety Seven and 60/100 Dollars, \$1697.60.

Payments of 85% of the manufactured and installed work are to be made as the work progresses, balance 30 days after final completion.

Accepted.

F. P. SMITH WIRE & IRON WORKS, INC.

Per F. P. Smith,

President.

Accepted,

Laskey & Laskey,

Per D. Laskey,

Witnesseth S. Laskey."

From the evidence before the Master, it appears that shortly after the execution of the contract, work began under it, and that the work was completed about December 1st, 1930; that shortly thereafter and repeatedly complainant made demands upon defendant for the amount claimed to be due, to which demands he received no response until January 19th, 1931, when complainant received the following letter:

"Attention Mr. F. P. Smith

F. P. Smith Wire & Iron Works,
2340 Clybourn Avenue,
Chicago, Ill.

The front steel stairs as per plan to receive
terrace risers and treads.

Stair railing brackets.

Door openings are to be made to receive all door
hardware.

Leadings are to be submitted to the general contractor
by the ornamental iron contractor for the approval of the
general contractor, as to construction, design, dimensions,
etc.

It is to be noted that the length of the
work is to be done within a reasonable length of time
and in a workmanlike manner.

All of the above the ornamental contractor agrees to
furnish and install for the sum of sixteen hundred and
twenty seven and 00/100 dollars, \$1627.00.

Payment of \$500 of the amount due and installed
work are to be made on the work progressed, balance \$1127
days after final completion.

Accepted.
F. P. SMITH WIRE & IRON WORKS, INC.

Per F. P. Smith,

President.

Accepted.

Lawrence J. Lasky,

Per C. Lasky,

Witness: E. Lasky.

From the evidence before the Master, it appears that shortly
after the execution of the contract, work began under it, and that
the work was completed about December 1st, 1930; that shortly there-
after and previously complainant made demands upon defendant for the
amount claimed to be due, to which demands he received no response
until January 1931, 1931, when complainant received the following

letter:

"Attention Mr. F. P. Smith

F. P. SMITH WIRE & IRON WORKS,
2320 OLYMPIAN AVENUE,
CHICAGO, ILL.

Gentlemen:

In reply to your letter of the 18th inst., please be advised that payment will not be made on the materials furnished for buildings 1903-04 South Michigan avenue and 52 East Oak Street, as it has not been manufactured and installed according to the terms of our contract with you dated August 7, 1930.

Yours very truly,

Laskey & Laskey, Per D. Laskey."

Up to this time, complainant had not been advised that there was any complaint made by defendants as to the work done, or of any claim that the contract had not been performed according to the terms thereof.

It appears from the record that the defendant, David Laskey, is a builder by profession; that he actively participated in the construction of the building in question, was present most of the time when the work contracted to be done by complainant was in progress, and that he then made no complaint as to the character of the work. The Master found that defendant's conduct amounted to an acceptance of the work, as did the trial court.

Among the witnesses called were several experts, who testified on behalf of the respective parties, and as is frequently the case, their testimony, as indicated by the record, is partisan.

One Elmer Gylleck, an architect called by defendant, testified that the work was crudely done and not in a good workmanlike manner. He further stated that a fair price for the work would be \$400.00.

Rudolph Charles Brunner, draftsman, designer, ornamental iron estimator and erection man, also testified on behalf of the defendants that the work done by complainant was not first class, and that it is not worth more than \$800.00.

Morris Laskey, a brother of defendant David Laskey and a builder, testified that a fair price for the work done would be \$325.00

Testimony:

It is to be noted that in the 1922 list of claims on which suit was brought will not be made on the material furnished for building 1900-02 which claim was returned and the last one returned, as it had not been made. The same was included according to the terms of my contract with you dated August 7, 1922.

Yours very truly,

Joseph A. Mackey, Jr. A. Mackey.

Up to this time, complaint has not been advised that there was any complaint made by defendant as to the work done, or of any claim that the contract had not been performed according to the terms thereof.

It appears from the record that the defendant, David

Lasky, is a builder by profession; that he actively participated in the construction of the building in question, was present most of the time when the work contracted to be done by complainant was in progress, and that he then made no complaint as to the character of the work. The master found that defendant's conduct amounted to an acceptance of the work, as did the trial court.

Among the witnesses called were several experts, who

testified on behalf of the respective parties, and as is frequently the case, their testimony, as indicated by the record, is pertinent.

One Elmer Gyllen, an architect called by defendant, testified that the work was crudely done and not in a good workmanlike manner. He further stated that a fair price for the work would be \$400.00.

Elmer Gyllen, architect, defendant, architect, testified on behalf of the defendant that the work done by complainant was not first class, and that it is not worth more than \$300.00.

Maxine Lasky, a brother of defendant David Lasky and a builder, testified that a fair price for the work done would be \$325.00.

Albert W. Bee Jr., a civil engineer and a graduate of the Massachusetts Institute of Technology, testified that he had had about 25 years experience as a designer and supervisor of construction, and that in his opinion the work done on the building was not a first class workmanlike job.

For complainant, O. Herbert Hill, ornamental iron manufacturer, testified that he had had a large experience in the business. He stated that he had examined the work done by complainant for defendant, and that it was well done, and that a fair price for the same would be \$2,150.00.

Charles C. Christensen, a structural engineer and designer of reinforced concrete and structural iron work for buildings, testified for complainant that he examined the finished structure and that it looked like a good job.

The record filed in the case consists of 850 pages. Many days were spent in the taking of testimony and the hearing of arguments. There is a great contrariety of testimony, both of alleged fact and opinion, given by the witnesses produced by the respective parties. The Master saw and heard these witnesses, and had an opportunity to pass upon their credibility or lack of it. In its latest announcement on the question as to the credit to be given to the finding of a Master, the Supreme Court in Hogg v. Bokhardt, 343 Ill. 346, said:

"The testimony of this witness has been subjected to a severe attack by counsel for appellee. The master heard the witness and had an opportunity to study him while he was on the witness stand."

By the contract between the parties, the amount to be paid is stated, and from the testimony, we find that the court was justified in holding that complainant has a lien for the sum fixed by the decree.

Alfred W. Lee Jr., a civil engineer and a graduate of the Massachusetts Institute of Technology, testified that he had had about 25 years experience as a designer and supervisor of construction, and that in his opinion the work done on the building was not a first class workmanlike job.

For complainant, O. Herbert Hill, ornamental iron manufacturer, testified that he had had a large experience in the business. He stated that he had examined the work done by complainant for defendant, and that it was well done, and that a fair price for the same would be \$1,100.00.

Charles H. Christensen, a structural engineer and designer of reinforced concrete and structural iron work for buildings, testified for complainant that he examined the finished structure and that it looked like a good job.

The record filed in the case consists of 280 pages. Many days were spent in the taking of testimony and the hearing of arguments. There is a great contrast of testimony, both of alleged fact and opinion, given by the witnesses produced by the respective parties. The master saw and heard these witnesses, and had an opportunity to pass upon their credibility or lack of it. In its latest announcement on the question as to the credit to be given to the finding of a master, the Supreme Court in Howe v. Johnson, 241 U.S. 240, said:

"The testimony of this witness has been subjected to a severe attack by counsel for appellee. The master heard the witness and had an opportunity to study him while he was on the witness stand."

By the contrast between the parties, the amount to be paid is stated, and from the testimony, we find that the court was justified in holding that complainant was entitled to the sum fixed by the master.

While the Master's fees seem to be all out of proportion, when the amount involved is taken into consideration, still when the great amount of time consumed in the hearing and the number of witnesses called by each party are considered, we do not feel justified in disturbing the decree in this regard.

For the reasons above stated, the decree of the Superior Court is affirmed.

AFFIRMED.

WILSON, P.J. AND HEBEL, J. CONCUR.

36188

WALTON SCHOOL OF COMMERCE, a
Corporation,

(Plaintiff) Appellant,

v.

OSBORNE LYSNE,

(Defendant) Appellee.

APPEAL FROM

MUNICIPAL COURT

OF CHICAGO.

270 I.A. 635²

Opinion filed May 24, 1933

MR. JUSTICE HALL DELIVERED THE OPINION OF THE COURT.

This is an appeal from a judgment for defendant, upon the verdict of a jury, in a suit on a written contract between plaintiff and defendant, by the terms of which and for the consideration of \$186.00, to be paid to plaintiff by defendant, plaintiff was to furnish to defendant certain lessons in business law, accounting and finance. In the statement of claim, to which a copy of the contract dated March 25th, 1930, is attached, plaintiff alleges that it performed all the covenants of the contract; that defendant paid \$93.75 on account, and that there is due plaintiff the sum of \$92.25. By the contract, defendant's payments were to be made in monthly installments. In his affidavit of merits, defendant states that prior to the execution of the contract, plaintiff represented to defendant that the course of teaching proposed, contemplated a system of teaching designed to instruct the defendant in the fundamentals of accounting; that the plan of teaching included a number of courses of which only one was sent to defendant. Defendant has filed no brief in this appeal.

C. T. Hoyte, the office manager of plaintiff's corporation, testified that after the execution of the contract he sent all the materials necessary for the course of study, but that defendant did not proceed with his studies. On July 7th, 1930, plaintiff received a letter from defendant in which defendant stated: "I may not begin

RECEIVED

WALTER DONOHUE OF COLUMBIA, N. Y.

(Plaintiff) Respondent

(Defendant) Appellant

Opinion filed May 24, 1933

MR. JUSTICE HALL DELIVERED THE OPINION OF THE COURT.

This is an appeal from a judgment for defendant, upon the verdict of a jury, in a suit on a written contract between plaintiff and defendant, by the terms of which and for the consideration of \$185.00, to be paid to plaintiff by defendant, plaintiff was to furnish to defendant certain lessons in business law, accounting and finance. In the statement of claim, to which a copy of the contract dated March 28th, 1930, is attached, plaintiff alleges that it performed all the covenants of the contract; that defendant paid \$93.75 on account, and that there is due plaintiff the sum of \$91.25. By the contract, defendant's payments were to be made in monthly installments. In his affidavit of merits, defendant states that prior to the execution of the contract, plaintiff represented to defendant that the course of teaching proposed, contemplated a system of teaching designed to instruct the defendant in the fundamentals of accounting; that the plan of teaching included a number of courses of which only one was sent to defendant. Defendant has filed no brief in this

G. T. Boyce, the office manager of plaintiff's corporation, testified that after the execution of the contract he sent all the materials necessary for the course of study, but that defendant did not proceed with his studies. On July 7th, 1930, plaintiff received a letter from defendant in which defendant stated: "I may not begin

my 'lesson' work until later," and explained his, defendant's failure to make past due payments. On September 23rd, 1930, plaintiff received another letter from defendant, promising payment. Both prior and subsequent to these letters from defendant to plaintiff, plaintiff had repeatedly written to defendant, expressing disappointment at his, defendant's, progress, and urging defendant to proceed with the course of instruction. The record shows that lessons and documents were sent to defendant by plaintiff to be used in connection with the course of instruction, which was all conducted and to be conducted by correspondence.

Defendant testified that he received a set of lessons which were to be sent back to plaintiff, but which defendant did not do. Plaintiff performed the contract on its part and there is nothing in the record which excuses defendant for the non-performance of the contract by him. It is the opinion of this court that the trial court was in error in overruling the motion for a new trial and in entering judgment against the plaintiff. The judgment is reversed and remanded.

REVERSED AND REMANDED.

WILSON, F.J. AND HEBEL, J. CONCUR.

by 'Lesson' with 'Lesson' and explained his defendant's failure to make good due payments. On September 22nd, 1930, Plaintiff received another letter from defendant, enclosing payment. This letter and subsequent to these letters from defendant to Plaintiff, Plaintiff had repeatedly written to defendant, expressing his disappointment at his defendant's progress, and asking defendant to proceed with the course of instruction. The record shows that lessons and documents were sent to defendant by Plaintiff to be used in connection with the course of instruction, which are all enclosed and to be conducted by correspondence.

Defendant testified that he received a set of lessons which were to be sent back to Plaintiff, but which defendant did not do. Plaintiff performed the contract on his part and there is nothing in the record which excuses defendant for the non-performance of the contract by him. It is the opinion of this court that the trial court was in error in overruling the motion for a new trial and in granting judgment against the Plaintiff. The judgment is reversed and remanded.

REVEREND AND HONORABLE

CLERK, J. L. AND WENDEL J. JOHNSON.

36017

DAVID O'CONNELL, Jr., a minor by
David J. O'Connell, his father
and next friend,

Plaintiff in Error,

v.

HENRY J. JEPSON,

Defendant in Error.

WRIT OF ERROR

TO CIRCUIT COURT

COOK COUNTY.

270 I.A. 635³

Opinion filed May 34, 1933

MR. JUSTICE REBEL DELIVERED THE OPINION OF THE COURT.

This cause is before this court upon a writ of error to the Circuit Court of Cook County, wherein the plaintiff as the next friend of David O'Connell, Jr., a minor, filed a suit for personal injuries in an action of trespass on the case against Henry J. Jepson, defendant. Trial was had before the court and a jury, and at the close of the hearing the jury returned a verdict of not guilty. To reverse the judgment entered on this verdict, this writ was sued out by the plaintiff.

The facts in substance are, that on the 3rd day of January, 1931, the defendant was driving his automobile south on Damen avenue and turned west on 63rd street, in Chicago, when the plaintiff, a boy about nine years of age, was crossing 63rd street in a north-easterly direction, near the intersection and towards the sidewalk on the northwest corner of 63rd street and Damen Avenue, and was struck and injured by the defendant's car. Just prior to the accident the plaintiff's minor stepped from an eastbound street car at this intersection, which had stopped at the southwest corner of Damen Avenue and 63rd street, intending to return to his home.

There is evidence that at the time the defendant turned at the intersection, the automobile operated by him was running at a speed from ten to fifteen miles per hour, and that no signal was sounded by a horn or other signal device at that time. The plaintiff

1000

WILLIAM O'DONNELL, Jr., a minor, by
David J. O'Donnell, his father
and next friend,

Plaintiff in Error,

v.

JOHN A. LITTON,

Defendant in Error.

TO CIRCUIT COURT

COOK COUNTY,

2701A.632

Opinion filed May 24, 1932

MR. JUSTICE ROBERT WILLIAMS FOR THE COURT.

THIS CASE IS BEFORE THIS COURT upon a writ of error in the

CAUSE OF ERROR of Cook County, wherein the plaintiff on the one

party of David O'Donnell, Jr., a minor, filed a suit for damages

against in an action of trespass on the one against Henry J. Litton,

defendant. Trial was had before the court and a jury, and at the

close of the hearing the jury returned a verdict in favor of the

plaintiff. The judgment entered on this verdict, this will now

be reversed.

The facts in substance are, that on the 2nd day of January,

1931, the defendant was driving his automobile south on Damen Avenue

and turned west on 63rd Street, in Chicago, when the plaintiff,

boy about nine years of age, was crossing 63rd Street in a north-

westerly direction, near the intersection and towards the sidewalk on

the northwest corner of 63rd Street and Damen Avenue, and was struck

and injured by the defendant's car. Just prior to the accident the

plaintiff's minor stepped from an eastbound street car at this inter-

section, which had stopped at the southeast corner of Damen Avenue

and 63rd Street, intending to return to his home.

There is evidence that at the time the defendant turned at

the intersection, the automobile operated by him was running at a

speed of 15 to 20 miles per hour, and that no signal was

sounded by a horn or other signal device at that time. The plaintiff

sustained severe injuries by reason of the force of the contact of the automobile with his body, and when the automobile was stopped, he was lying back of it about four feet west of the sidewalk line.

The defendant testified that he did not see the boy until the boy was within two or three feet of the curb. There is conflict in the evidence as to the point where the boy was at the time of the accident.

The question of fact and the circumstances surrounding the accident are for the jury. For the reason that the case is to be retried, this court will not consider the question of whether the verdict is against the manifest weight of the evidence.

The plaintiff complains of the following instruction:

"You are instructed that the mere happening of an accident, in and of itself, raises no presumption of negligence on the part of the defendant, nor is it evidence in and of itself of the exercise of due care on the part of the plaintiff. And if you believe from the evidence, under the instructions of the court, that the injury to the plaintiff was the result of a mere accident, or one which was unavoidable, or which occurred without negligence on the part of the defendant, then you should return a verdict of not guilty."

and contends that the instruction is prejudicial in that it does not state the several duties required of the defendant under the circumstances surrounding the accident, and is erroneous in directing a verdict of not guilty. It is to be noted that the jury was instructed that they were to determine whether the injury was the result of a mere accident, or one which was unavoidable, and, finally, the jury was instructed in these words, "or which occurred without negligence on the part of the defendant."

The instruction in question directs a verdict of not guilty if the injury to the plaintiff was the result of a mere accident. This instruction is misleading and should have been modified by the insertion of the words, "without negligence of the defendant," after the word "accident." Cohen v. Weinstein, 231 Ill. App. 84.

The rule is that if the injury is the combined result of an accident and negligence in the operation of the instrumentality causing the injury, and the accident would not have occurred but for such negligence, and the danger could not have been foreseen or avoided by ordinary care, then the defendant will be liable to the party injured. City of Aurora v. Pulfer, 58 Ill. 270. City of Chicago v. Sheehan, 113 Ill. 658.

The instruction did not combine want of negligence of the defendant with the occurrence of the accident, which would be necessary to justify the giving of it to the jury.

We cannot agree with the defendant's theory that the jury was properly instructed when the court told the jury in three ways that if the occurrence in question happened without negligence on the part of the defendant, the jury should find the defendant not guilty. The vice of the instruction is that the want of negligence of the defendant is not conjunctively made a part of the cause of the accident pointed out in the instruction.

For the reasons above indicated, the judgment is reversed and the cause remanded.

JUDGMENT REVERSED AND CAUSE REMANDED.

WILSON, P.J. AND HALL, J. CONCUR.

The rule is that if the injury is the combined result of an accident and negligence in the operation of the instrumentality causing the injury, and the accident would not have occurred but for such negligence, and the injury would not have been foreseen or avoided by ordinary care, then the defendant will be liable to the party injured. City of Chicago v. Miller, 33 Ill. 270. City of Chicago v. Miller, 122 Ill. 630.

V. REASONABLE AND CAREFUL PERSON.

The instruction did not contain want of negligence of the defendant with the occurrence of the accident, which would be necessary to justify the giving of it to the jury.

We cannot agree with the defendant's theory that the jury was properly instructed when the court told the jury in three ways that if the occurrence in question occurred without negligence on the part of the defendant, the jury should find the defendant not guilty. The view of the instruction is that the want of negligence of the defendant is not conclusively made a part of the cause of the accident pointed out in the instruction.

For the reasons above indicated, the judgment is reversed and the cause remanded.

JUDGMENT REVERSED AND CAUSE REMANDED.

WILSON, J. J. AND HALL, J. CONCUR.

36065

HERBERT S. YOUNGQUIST,
Appellee,

v.

GREAT LAKES FINANCE CORPORATION,
a corporation, and ALBERT W. FROENDE,
Appellants.

APPEAL FROM

CIRCUIT COURT

COOK COUNTY.

270 I.A. 635⁴

Opinion filed May 24, 1933

MR. JUSTICE REBEL DELIVERED THE OPINION OF THE COURT.

This appeal is by the defendants from a judgment entered by the court upon a verdict of a jury finding the defendants guilty and assessing the plaintiff's damages in the sum of \$1500.00.

This action is founded upon an allegation of malicious prosecution by the defendants, and the principal defense is that the defendants acted upon advice of counsel, which they claim is a complete and absolute defense to an action for malicious prosecution where it appears that a full, fair and truthful statement of facts is made to an attorney and the defendant acts upon his advice that in his prosecution of the charge there was probable cause.

The facts in the case are, substantially, that the plaintiff is a young married man and has lived in Chicago all of his life; is engaged in the automobile business with one Louis G. Kailer, as a co-partner under the trade name of Kailer-Youngquist Motor Sales; that he is also engaged in the florist business, which enterprise he conducts with his wife, but devoted most of his time to the automobile business. The Kailer-Youngquist Motor Sales has since 1927 been engaged in the retail automobile business as factory representative of the Olds Motor Works; since 1928 the business has been conducted at 5031-5033 Broadway, Chicago.

From the plaintiff's evidence it appears that he had never been arrested prior to the arrest in question, and that he had never been charged with any violation of law, or with a criminal offense. There is evidence that the plaintiff had a good reputation.

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On December 23, 1930, A. W. Froehde, one of the defendants, signed a complaint for the arrest of the plaintiff on the charge of obtaining money under false pretenses. On January 3, 1931, plaintiff was arrested and caused to appear before the examining Magistrate on January 5, 1931. On that date the case was continued to January 14, 1931, and on this date the cause was tried before the court which issued the warrant. Witnesses were heard for both the prosecution and the defense, and the plaintiff was discharged and the case dismissed.

It also appears from the evidence that Kailer-Youngquist Motor Sales had been discounting its conditional sales contract and notes without recourse with the defendant Finance Corporation. The contracts were prepared on forms furnished by the defendant company.

On October 31, 1930, one Harold Fields purchased from Kailer-Youngquist Motor Sales a new Viking sedan automobile. The Motor Sales contract was prepared on the usual form of the Great Lakes Finance Corporation, and after an investigation, the defendant finance company approved the conditional sales contract and note evidencing the indebtedness, and discounted the paper.

From the facts in evidence, the Olds Motor Works manufactured 8,000 Viking cars in 1929 between the months of March and November. The cars manufactured in the latter part of the year were fitted with improved piston and piston rings. The automobile sold to Fields was a new car and was equipped with the new piston and piston rings, and while it was manufactured in the early part of the year, it was identical with the cars ^{manufactured} ~~manufactured~~ by the Olds Motor Works in the latter months of 1929.

The conditional sales contract and note for \$1,351.54, were executed by Fields, the purchaser, and sold to the defendant company for the sum of \$1,040. The note was to be paid in eighteen

On December 22, 1930, A. W. Freese, one of the defendants,

signed a complaint for the arrest of the plaintiff on the charge of obtaining money under false pretenses. On January 2, 1931, plaintiff was arrested and ordered to appear before the examining magistrate on January 8, 1931. On that date the case was continued to January 14, 1931, and on this date the case was tried before the court which issued the warrant. Witnesses were heard for both the prosecution and the defense, and the plaintiff was discharged and the case dismissed.

It also appears from the evidence that Kaiser-Yountz and other sales had been obtaining the conditional sales contracts and other related documents with the defendant Finance Corporation. The contracts were prepared on forms furnished by the Finance Corporation. On October 21, 1930, one David Fields purchased a Kaiser-Yountz motor car as was being sold by the defendant Finance Corporation. The contract was prepared on the usual form of the Finance Corporation, and after an investigation, the defendant Finance Corporation approved the conditional sales contract and gave evidence to the defendant, and discussed the paper.

From the facts in evidence, the Olds Motor Works manufactured a 1930 Olds car in 1930 before the month of May and November. The car manufactured in the latter part of the year were fitted with inverted piston and piston rings. The automobile sold to Fields was a new car and was equipped with the new piston and piston rings, and while it was manufactured in the early part of the year, it was manufactured with the same piston rings as the Olds Motor Works in the latter months of 1930.

The conditional sales contract was made by D. Fields.

was executed by Fields, the purchaser, and sold to the defendant company for the sum of \$1,040. The note was to be paid in eighteen

monthly installments of \$69.53. The first installment was due on the first day of December, 1930, and was in default. After the default Froehde, also a defendant, telephoned to both Kailer and Youngquist, and stated, in substance, that unless Youngquist paid the total amount of money due he would throw him in jail, which call was supplemented by a letter on the stationery of the defendant company and signed by Froehde as vice-president, to the effect that unless the money in payment of the two contracts, the terms of which were grossly misrepresented, was received, they would place the matter in the hands of their attorneys who advised them that they had good ground for both civil and criminal actions. The letter also called attention to the fact that they believed that the officials of the Olds Motor Works would not approve of this conduct on the part of any of their dealers, and if necessary they would lay the facts before them. Thereafter, upon complaint of Froehde, the prosecution followed.

The complaint of the defendants is that in the body of the sales contract the year 1930 was inserted in the handwriting of the plaintiff as the year in which the automobile was manufactured, when as a matter of fact it was manufactured in 1929. The defendant Froehde, an attorney admitted to practice law, sought the advice of Paul E. Price, whose standing in the legal profession was admitted by the plaintiff, and upon the advice of Price, the plaintiff was arrested upon complaint made by Froehde.

It appears from the evidence that Froehde submitted to his attorney the fact that the conditional sales contract contained a statement that the car financed was a 1930 Viking; that this was false and that the car was a 1929 Viking, and that Froehde stated that in certain other transactions with the plaintiff concerning a car sold,

monthly installment of \$80.00. The first installment was due on the first day of December, 1930, and was in default. After the default occurred, also a defendant, telephoned to both Keller and Youngblood, and stated, in substance, that unless Youngblood paid the total amount of money due he would throw him in jail, which call was accompanied by a letter in the testimony of the defendant company and signed by Froehde as vice-president, to the effect that unless the money in payment of the two contracts, the terms of which were orally stipulated, was received, they would place the matter in the hands of their attorneys who advised them that they had good ground for both civil and criminal actions. The letter also called attention to the fact that they believed that the officials of the Ohio Motor works would not approve of this conduct on the part of any of their dealers, and if necessary they would lay the facts before them. Thereafter, upon complaint of Froehde, the prosecution followed.

The complaint of the defendants is that in the body of the same complaint the fact that the automobile was manufactured, when plaintiff as the year in which the automobile was manufactured, when as a matter of fact it was manufactured in 1928. The defendant Froehde, an attorney admitted to practice law, sought the advice of Paul E. Rice, whose standing in the legal profession was admitted by the plaintiff, and upon the advice of Rice, the plaintiff was arrested upon complaint made by Froehde.

It appears from the evidence that Froehde admitted to his attorney the fact that the conditional sales contract contained a statement that the car financed was a 1930 Viking; that this was false and that the car was a 1928 Viking, and that Froehde stated that he

the car was referred to in the conditional sales contract as new, when in fact it was a used car. The defendant Froehde did not convey to the lawyer when he sought his advice the plan in use in the purchase of conditional sales contracts and promissory notes from Kailer-Youngquist Motor Sales, which is in substance that Kailer-Youngquist Motor Sales would telephone defendant's company and a clerk would take down the information in regard to a proposed purchase, the make of the car, the year and model, selling price, down payment, and the unpaid balance. The defendant would then investigate the credit references and call the sales company and, if satisfied, approve the deal. The information sheet of the defendant company would be checked as to its correctness, and values on similar automobiles would be compared.

The rule of law is that there must be a reliance by the owner of the property on the alleged false pretence, and the pretence must be the effective cause of inducing the owner to part with his property. If the owner has knowledge of the truth or does not believe the pretence, or investigates it and parts with the property, relying entirely on the results of his investigation, the offense of obtaining money or property by means of false pretence has not been committed. 25 Corpus Juris, p. 599. This same rule applies where the ground for avoiding a contract is one of fraud. The fact that the owner of property which is the subject of a contract makes representations as to the quality of the property, which prove to be untrue, will not furnish grounds for avoiding liability under the contract, where the other party does not rely on such representations, but enters into the contract upon his own investigation and examination. Fauntleroy et al. v. Wilcox et al., 90 Ill. 477; Walker v. Carrington et al., 74 Ill. 446; Grooker v. Manley, 164 Ill. 282. In the instant case the fact of the investigation made by the defendants was not submitted

the one was referred to in the conditional sales contract as new,
when in fact it was a used car. The defendant testified that he did not convey
to the lawyer when he sought his advice the plain fact in the
purchase of conditional sales contracts and promissory notes from
Keller-Franklin Motor Sales, which in its substance that Keller-
Franklin Motor Sales would purchase the car, and in 1933
it would take down the information in regard to a proposed pur-
chase, the make of the car, the year and model, selling price, down
payment, and the unpaid balance. The defendant would then investi-
gate the credit references and call the sales company and, if satis-
fied, approve the deal. The information about the defendant
company would be checked as to its correctness, and when on similar
information could be secured.

The sale of the car in fact was made as a result of the owner
of the property on the alleged false pretense, and the pretense must
be the effective cause of inducing the owner to part with his property.
If the owner has knowledge of the truth or does not believe the
pretense, no investigation is made with the company, relying
entirely on the results of his investigation, the absence of obtaining
money or property by means of false pretense has not been committed.
30 Corpus Juris, p. 398. This same rule applies where the ground for
avoiding a contract is one of fraud. The fact that the owner of
property which is the subject of a contract makes representations
as to the quality of the property, which prove to be untrue, will not
constitute grounds for avoiding liability under the contract, where the
other party does not rely on such representations, but enters into
the contract upon his own investigation and examination. Langbein v.
Langbein, 30 Ill. 2d 111, 177; Miller v. Langbein, 30 Ill. 2d 111, 177.
30 Ill. 2d 111, 177; Miller v. Langbein, 30 Ill. 2d 111, 177. In the instant case
the fact of the investigation made by the defendant was not admitted

to the attorney when his advice was sought. The advice of counsel to be sufficient as a defense must have been obtained in good faith from a competent and reliable attorney upon a full and accurate statement of fact. Whether the advice of counsel is a complete defense upon the facts submitted in an action for malicious prosecution, is always a question for the jury. Fadner v. Filer, 27 Ill. App. 506; Meidler v. Beirnaert, 25 Ill. App. 423; Gruel v. Bengier, 74 Ill. App. 36; Lyons v. Kanter, 285 Ill. 336.

The verdict of the jury in the case before us is supported by the evidence that the automobile was a new Viking car and was fully described when the application for sale of the contract and note was made by Kailer-Youngquist Motor Sales. The defendants had complete knowledge of the details of the transaction, and before purchasing the paper, made an investigation, and being fully satisfied with the transaction, purchased the conditional sales contract and the note signed by Fields. The fact that advice was obtained from an attorney upon a statement that was not complete is not a sufficient defense based upon advice of counsel, and the jury evidently did not consider it sufficient when it returned its verdict.

The defendant contends that where the facts are stated to the judicial officer and such officer erroneously concludes that a crime has been committed and directs the arrest of the alleged culprit, the informant is not liable in damages to the person arrested in a suit for malicious prosecution, and relies on the case of Glenn v. Lawrence, 280 Ill. 581.

The court in that case announced two rules. One is that where an ordinary complaint that a criminal offense has been committed merely charges its commission substantially in the language of the statute creating the offense, and whether the facts known to the defendant constitute probable cause is subject to proof in a suit for malicious prosecution; and the other rule announced by the Supreme

to the attorney when his advice was sought. The advice of counsel
to be sufficient as a defense must have been obtained in good faith
from a competent and reliable attorney upon a full and accurate
statement of fact. Whether the advice of counsel is a complete
defense upon the facts submitted in an action for malicious prosecution
is always a question for the jury. People v. [redacted], 112 Ill. 2d 111.
People v. [redacted], 112 Ill. 2d 111. People v. [redacted],
75 Ill. App. 3d 381, 382 Ill. 330.

The verdict of the jury in the case before us is supported
by the evidence that the automobile was a new Viking car and was
fully described when the application for sale of the contract was
made and made by [redacted] and [redacted]. The defendant had
complete knowledge of the details of the transaction, and before
procuring the car, made an investigation, and being fully satis-
fied with the transaction, purchased the conditional sales contract
and the note signed by [redacted]. The fact that advice was obtained
from an attorney upon a statement that was not complete is not a
sufficient defense based upon advice of counsel, and the jury evi-
dently did not consider it sufficient when it returned its verdict.
The defendant contends that where the facts are stated so

the judicial officer and each officer erroneously concludes that
a crime has been committed and directs the arrest of the alleged
subject, the informant is not liable in damages to the person arrested
in a suit for malicious prosecution, and relies on the case of Allen
v. [redacted], 250 Ill. 251.

The court in that case announced two rules. One is that
there is ordinary negligence that a judicial officer has been negligent
when he directs the commission substantially in the language of the
statute directing the arrest, and whether the facts known to the
defendant constitute probable cause is subject to proof in a suit for
malicious prosecution; and the other rule announced by the Supreme

Court is that when the facts are stated in detail in the complaint and submitted to the justice for decision, they constitute probable cause and the same rule applies where the facts are fully and truthfully stated to reputable counsel.

The defendant Froehde's statement made to the court is substantially the same as was submitted by him to his attorney for advice. The fact, however, that the defendant investigated the proposed sale of the conditional sales and note was not communicated to his attorney. The charge made in the complaint by Froehde is in the language of the statute charging that the plaintiff unlawfully and fraudulently and with the intent to defraud by means of false pretense obtained the defendant corporation's money amounting to \$1,040.

The facts upon which this charge is made were known to the defendants, and are subject to proof, and the question to be decided as to the probable cause is one for the jury, and the rule of the Supreme Court first stated in this opinion is controlling and applies in this case.

The next question to be considered is did the court err in modifying the defendant's instruction No. 18. The court modified this instruction which was offered and is to the effect that Albert W. Froehde before he made the affidavit and procured a warrant for the arrest of the plaintiff consulted in good faith an attorney at law, etc., by inserting the words, "a reputable and competent," before the words, "Attorney at law." This modification is consistent with the words used in the defendants' instruction to the effect that the defendant consulted with "counsel learned in the law." The plaintiff did not question the reputation or competency of the attorney consulted, and we are not inclined to view this instruction so modified as reversible error.

Court is that when the facts are stated in detail in the complaint and submitted to the justice for decision, they constitute proper cause and the same rule applies where the facts are fully and truthfully stated as in this case.

The defendant Trovada's statement made to the court is substantially the same as was submitted by him to his attorney for advice. The fact, however, that the defendant investigated the previous sale of the conditional sales and note was not communicated to his attorney. The charge made in the complaint by Trovada is in the language of the statute charging that the plaintiff unlawfully and fraudulently and with the intent to defraud by means of false evidence obtained the defendant corporation's money amounting to \$1,000.

The facts upon which this charge is made were known to the defendant, and are subject to proof, and the question is not decided as to the probable cause in one for the jury, and the rule of the Supreme Court first stated in this opinion is controlling and applies in this case.

The next question to be considered is did the court err in modifying the defendant's indictment No. 12. The court modified this indictment which was offered and is to the effect that Albert J. Trovada before he made the affidavit and procured a warrant for the arrest of the plaintiff conspired in good faith as attorney at law, etc., by inserting the words, "a reputable and competent" before the words, "attorney at law." This modification is consistent with the words used in the defendant's indictment to the effect that the defendant conspired with "counsel learned in the law."

The plaintiff did not question the reputation or competency of the attorney concerned, and we are not inclined to view this indictment as modified as in this case.

The verdict of the jury is not against the manifest weight of the evidence, and the amount fixed as damages is not grossly excessive, but is fully justified by the proof. The judgment entered upon the verdict is not based upon error, and the defendants had a fair and impartial trial.

The judgment is therefore affirmed.

JUDGMENT AFFIRMED.

WILSON, F.J. AND HALL, J. CONCUR.

The verdict of the jury is not against the evidence weight
of the evidence, and the same is not grossly
erroneous, but is fully justified by the facts. The judgment entered
upon the verdict is not based upon error, and the defendant has
a fair and honest trial.
The judgment is therefore affirmed.

JUDGMENT AFFIRMED.

WITNESSES, J. J. HARRIS, A. G. COOPER.

36078

ALICE ELIZABETH LANGE, by Andrew G. Lange,
her next friend,

Appellant,

v.

HARRY SMITH,

Appellee.

APPEAL FROM

SUPERIOR COURT

COOK COUNTY.

270 I.A. 636

Opinion filed May 24, 1933

MR. JUSTICE HEREL DELIVERED THE OPINION OF THE COURT.

This is an action on the case filed by the plaintiff as next friend of Alice Elizabeth Lange, a minor, against the defendant. The case was tried before a jury, and a verdict of not guilty was returned, upon which a judgment was entered by the court, and from which the plaintiff appeals.

The case is largely one of fact upon the question as to which one of the parties had the right of way at street intersections.

The accident occurred on the 10th day of February, 1931, at the intersection of Touhy and Ashland Avenues, Chicago. The traffic at this intersection is controlled by a stop-and-go signal light. Plaintiff's evidence is that she had the right of way by the flash of the green signal light, and that she drove an automobile roadster into the intersection, when the auto truck operated by the defendant's agent, coming from the south, entered the intersection at the time the red signal light was against him, and the collision occurred. This is denied by the evidence offered by the defendant, which is to the effect that the plaintiff continued to drive the roadster against the red signal light - the notice to stop and not continue - and did not heed the light, which resulted in the collision with the defendant's truck having the right of way.

The plaintiff's minor was 17 years of age at the time of the accident, and according to her testimony she was the owner of

ALICE ELIZABETH LANGE, by Andrew G. Lange,
Her next friend,

Appellant,

SUPERIOR COURT

SAINT ANTONIO

Appellee.

370 I.A. 686

Opinion filed May 24, 1933

MR. JUSTICE BREWER DELIVERED THE OPINION OF THE COURT.

This is an action on the case filed by the plaintiff as next friend of Alice Elizabeth Lange, a minor, against the defendant. The case was tried before a jury, and a verdict of not guilty was returned, upon which a judgment was entered by the court, and then when the plaintiff appeals.

The case is largely one of fact upon the question as to which one of the parties had the right of way at street intersection. The accident occurred on the 10th day of February, 1931.

at the intersection of Lundy and Oakland Avenues, Chicago. The traffic at this intersection is controlled by a stop-and-go signal light. Plaintiff's evidence is that she had the right of way by the flash of the green signal light, and that she drove an automobile wester into the intersection, when the east truck operated by the defendant's agent, coming from the south, entered the intersection at the time the red signal light was against him, and the collision occurred. This is denied by the evidence offered by the defendant.

which is so the effect that the plaintiff continued to drive the wester against the red signal light - the notice to stop and not continue - and did not heed the light, which resulted in the collision with the defendant's truck having the right of way.

The plaintiff's minor was 14 years of age at the time of the accident, and according to her testimony she was the owner of

the automobile operated by her at the time. The automobile license, however, was paid for and registered in the name of the parent of this young lady. The doctor in attendance was not called as a witness, and there is no evidence of any expense incurred or paid for medical aid.

The record is not clear as to what injuries were sustained, but apparently they were without serious consequence for no attempt was made to call the physician attending the young lady to prove the nature of the injuries sustained by her.

The evidence offered by the plaintiff was not altogether free from contradiction, in that a witness offered by the plaintiff was not certain as to the location of the signal light posts at the intersection, nor the location of the automobiles after the accident.

The evidence offered by the defendant seems to be more consistent and certain, and no doubt the jury considered it more probable, as evidenced by its verdict.

The plaintiff complains that the case is close as to the facts, and the jury should have been properly instructed; that the court erred in the giving of six instructions, which unduly emphasized the defense of contributory negligence. The giving of instructions should always be as few in number as is consistent with the issues involved, in order not to confuse the jury. The practice of giving a large number of instructions for either the plaintiff or the defendant has been criticized time after time, but in this case the facts and circumstances in evidence are such that the jury was not confused or misled by the instructions.

The case was fairly tried, and no complaint is made that the court erred in its ruling except as to the giving of certain

the automobile operated by her at the time. The automobile license, however, was paid for and registered in the name of the owner of this young lady. The doctor in attendance was not called as a witness, and there is no evidence of any expense incurred or paid for medical aid.

The record is not clear as to what injuries were sustained, but apparently they were without serious consequences for no attempt was made to call the physician attending the young lady to prove the nature of the injuries sustained by her.

The evidence offered by the plaintiff was that the defendant was not certain as to the location of the signal light posts at the intersection, nor the location of the automobile after the accident. The evidence offered by the defendant seems to be more consistent and reliable, and on that the jury concluded it was probable as evidenced by its verdict.

The plaintiff complains that the case is close as to the facts, and the jury should have been properly instructed that the court erred in the giving of six instructions, which unfairly prejudiced the defense of contributory negligence. The giving of instructions should always be so far in number as to compass all the issues involved, in order not to confuse the jury. The question of giving a large number of instructions has arisen the plaintiff on one defendant has been instructed since that time, but in this case the facts and circumstances in evidence are such that the jury was not confused or misled by the instructions.

The case was fairly tried, and no complaint is made that the court erred in its ruling except as to the giving of certain

instructions offered by the defendant. As we have already stated, there is no error in the giving of the six instructions which would warrant a reversal of the case.

The jury having returned a verdict finding the defendant not guilty, and the plaintiff's action based upon the negligence of the defendant having failed, the defendant's instruction upon the question of the ownership of or damage to the automobile was not harmful, where the jury did not consider the question of damages when it found the defendant not guilty of negligence.

The defendant's mere accident instruction given to the jury is complained of by the plaintiff for the reason that the evidence in the case did not justify such instruction. The fact is that both the plaintiff's and the defendant's evidence is to the effect that each of the respective parties had the green signal light to proceed and did drive into the intersection, and if the jury believed that to be a fact, then the collision between the two cars was a mere accident for which the parties are not responsible, and therefore the instruction was proper under the circumstances.

This court is satisfied that the record is not subject to error such as would warrant a reversal, and the judgment is accordingly affirmed.

JUDGMENT AFFIRMED.

WILSON, P.J. AND HALL, J. CONCUR.

instructions offered by the defendant. As we have already stated, there is no error in the giving of the six instructions which would warrant a reversal of the case.

The jury having returned a verdict finding the defendant not guilty, and the plaintiff's action based upon the negligence of the defendant having failed, the defendant's instruction upon the question of the ownership of or damage to the automobile was not material, where the jury did not consider the question of damages when it found the defendant not guilty of negligence.

The defendant's sixth accident instruction given to the jury is complained of by the plaintiff for the reason that the evidence in the case did not justify such instruction. The fact is that both the plaintiff's and the defendant's evidence is to the effect that each of the respective parties had the green signal light to proceed and did drive into the intersection, and at the time of collision that to be a fact, then the collision between the two cars was a mere accident for which the parties are not responsible, and therefore the instruction was proper under the circumstances. This court is satisfied that the record is not subject to error such as would warrant a reversal, and the judgment is accordingly affirmed.

JUDGMENT AFFIRMED.

ALLISON, F. J. AND HALL, J. CONCUR.

36099

ANDY F. RUNYON,

Appellee,

v.

JOHNSON ELECTRIC CO., a Corporation,

Appellant.

APPEAL FROM

SUPERIOR COURT

COOK COUNTY.

270 I.A. 636²

Opinion filed May 24, 1933

MR. JUSTICE REBEL DELIVERED THE OPINION OF THE COURT.

The defendant appeals from a judgment in the sum of \$1,430, entered in favor of the plaintiff in an action in assumpsit submitted to the court without a jury.

The facts are, substantially, that the plaintiff's trade is that of a journeyman electrician, and that he has been engaged in that business for fifteen years or more; that he became an employee of the defendant in the fall of 1926, at which time the wage scale for journeymen electricians was \$1.50 an hour, and continued in that employment until the latter part of July, 1927. At that time he worked for the defendant as an estimator and solicitor at a salary of \$75.00 per week, which salary was later raised to \$80.00 per week, and in the spring of 1929, was raised to \$85.00 a week for such work.

On January 4, 1930, the plaintiff and the defendant discussed a reduction in plaintiff's salary due to the existing financial depression.

The plaintiff's evidence is to the effect that he was to receive \$80.00 a week to be paid by the defendant; that this was a temporary arrangement and that the difference between \$80.00 and \$85.00 was to be paid by the defendant later.

The defendant's evidence, however, is to the effect that the reduction in salary was accepted by the plaintiff, and that this was evidenced by the acceptance of the \$80.00 a week; From the evidence it appears that the wages were paid irregularly from

ANDY E. WINN

Appellee

JAMES E. ELLIOTT CO., a Corporation

Appellant

COOK COUNTY

270 LA. 636

Opinion filed May 24, 1933

MR. JUSTICE HENRY DELIVERED THE OPINION OF THE COURT.

The defendant appeals from a judgment in the sum of \$1,430, rendered in favor of the plaintiff in an action in assumpsit submitted to the court without a jury.

The facts are, substantially, that the plaintiff's trade is that of a journeyman electrician, and that he has been engaged in that business for fifteen years or more; that he became an employee of the defendant in the fall of 1928, at which time the wage scale for journeymen electricians was \$1.50 an hour, and continued in that amount until the latter part of July, 1929. At that time he worked for the defendant as an estimator and collector at a salary of \$75.00 per week, which salary was later raised to \$80.00 per week, and in the spring of 1932, was raised to \$85.00 a week for some time.

On January 4, 1933, the plaintiff and the defendant discussed a reduction in plaintiff's salary due to the existing financial depression.

The plaintiff's evidence is to the effect that he was to receive \$85.00 a week to be paid by the defendant; that this was temporarily arrangement and that the difference between \$80.00 and \$85.00 was to be paid by the defendant later. The defendant's evidence, however, is to the effect that the reduction in salary was accepted by the plaintiff, and that this was evidenced by the acceptance of the \$80.00 a week; that from the evidence it appears that the wages were paid irregularly from

this time on, both as to time and amount, and on February 7, 1931, the plaintiff left the employment of the defendant.

The defendant admitted in his affidavit of merits that there was a balance of \$165. due the plaintiff, and that the plaintiff was paid at the rate of \$60.00 per week. By stipulation of the parties, judgment was entered for this amount and satisfied in open court. A trial was had as to the balance claimed to be due the plaintiff from the defendant, and after a hearing, judgment was entered by the court for the amount appealed from.

The defendant contends that in an action to recover wages claimed to be due under an oral agreement, the burden of proving the terms of the contract under which the claim is made, is upon the plaintiff. This is the general rule, but in the instant case the evidence establishes the fact that the plaintiff did receive \$85.00 a week from the defendant until the reduction to \$60.00 was paid, and the conflict in the evidence is whether the plaintiff was to receive the \$60.00 in full payment of his wages each week, in lieu of the \$85.00, previously received, or whether the difference between the \$60.00 per week and the \$85.00 per week was to be paid later by the defendant.

The trial court was called upon to determine that issue, and as we view it, the finding of the court is sustained by the evidence; also its finding that the plaintiff did not accept the \$60.00 weekly salary in full of his services.

The court had the witnesses before it, and no doubt noted their several appearances, demeanor, and the fairness of their testimony, which is denied this court. The appearance of a witness and his frankness in testifying is a factor of importance in determining the credibility of the witness, and is an advantage in determining where the truth lies. The weight of the evidence is for the trial court, and only when the question is raised whether the

this time on, both as to time and amount, and on February 7, 1931.

The plaintiff left the employment of the defendant.

The defendant admitted in his affidavit of service that there

was a balance of \$185.00 due the plaintiff, and that the plaintiff

was paid at the rate of \$30.00 per week. By stipulation of the

parties, judgment was entered for this amount and satisfaction is taken

thereof. A trial was had as to the balance claimed to be due the

plaintiff from the defendant, and after a hearing, judgment was

entered by the court for the amount requested from

the defendant consisting of an action to recover wages

claimed to be due under an oral agreement, the amount of wages

the terms of the contract under which the claim is made, is upon

the plaintiff. This is the general rule, but in the instant case

the evidence established the fact that the plaintiff did receive

\$30.00 a week from the defendant until the termination of \$30.00 was

paid, and the conflict in the evidence as to whether the plaintiff

was to receive the \$30.00 in full payment of his wages each week,

in lieu of the \$30.00, previously received, or whether the difference

between the \$30.00 per week and the \$30.00 per week was to be paid

later by the defendant.

The trial court was called upon to determine that issue,

and as we view it, the finding of the court is sustained by the

evidence; also the finding that the plaintiff did not accept the

\$30.00 weekly salary in full of his services.

The court had the witnesses before it, and no doubt noted

their several appearances, demeanor, and the fairness of their

testimony, and is deemed to have done so. The appearance of a witness

and his fairness in testifying is a factor of importance in deter-

mining the credibility of the witness, and is an advantage in deter-

mining where the truth lies. The weight of the evidence is for the

trial court, and only when the question is raised whether the

manifest weight of the evidence is against the conclusion of the trial court, is this court called upon to consider the evidence. Illinois-Indiana Fair Assn. V. Phillips, 341 Ill. App. 454. This court has examined the record, from which it appears that the evidence amply sustains the Court's conclusions upon the issues.

We next consider the objection of the defendant to the evidence of the plaintiff as to the Union wage scale for journeymen electricians. This evidence is not material upon the question of what salary was to be paid to the plaintiff, nor under what terms. The familiar rule is that a trial court in passing upon the submitted evidence will disregard improper or incompetent evidence in determining the issues. Victor v. Warner, 248 Ill. App. 35. The rule, however, does not apply to a jury trial, and it may be that evidence of the nature objected to is immaterial to the issues involved and may warrant a new trial, but this is dependent upon the evidence even in a jury trial, for if the evidence clearly establishes that the conclusion of the jury is a proper one and no other conclusion could be reached, this court will not reverse the judgment entered on such verdict.

There is evidence offered by the plaintiff that a proposition was made by the defendant to turn over some second mortgage notes in payment of plaintiff's claim, to which the defendant objected on the ground that the offer was made in order to effect a compromise and was not admissible in evidence.

We have examined the abstract of record but do not find that the defendant objected to the admissibility of this evidence, or moved to have it stricken from the record. Therefore this evidence being in the record without objection it tends to show that this offer of payment was made to take care of the balance due the plaintiff,

weight of the evidence is against the conclusion of the trial court, is this court called upon to consider the evidence. Illinois-Indiana Bell Corp. v. Bell Tel. & Tel. Co., 344 Ill. App. 3d 104. This court has examined the record, from which it appears that the evidence amply sustains the court's conclusion upon the issues.

We next consider the objection of the defendant to the evidence of the plaintiff as to the value of the property. This evidence is not material upon the question of what salary was to be paid to the plaintiff, nor under what terms. The familiar rule is that a trial court in passing upon the admissibility of evidence will disregard improper or incompetent evidence in determining the issues. Wicks v. Wicks, 345 Ill. App. 3d 105. The rule, however, does not apply to a jury trial, and it may be that evidence of the nature objected to is immaterial to the issues involved and may warrant a new trial, but this is dependent upon the evidence even in a jury trial, for if the evidence clearly establishes that the conclusion of the jury is a proper one and no other conclusion could be reached, this court will not reverse the judgment entered on such verdict.

There is evidence offered by the plaintiff that a promissory note made by the defendant to turn over some second mortgage notes in payment of plaintiff's claim, on which the defendant objected on the ground that the offer was made in order to effect a compromise and was not admissible in evidence.

We have examined the abstract of record and do not find that the defendant objected to the admissibility of this evidence or moved to have it stricken from the record. Therefore this evidence being in the record without objection it tends to show that this offer of payment was made to take care of the balance due the plaintiff.

and it was not erroneously admitted by the trial court at the time it was offered.

For the reasons stated, the judgment is affirmed.

JUDGMENT AFFIRMED.

WILSON, P.J. AND HALL, J. CONCUR.

and it was not voluntarily admitted by the trial court at the time
it was offered.

For the reasons stated, the judgment is affirmed.

JUDGMENT AFFIRMED.

THOMAS J. HENNESSY, J. CLERK.

36114

ANTHONY WITKOWSKI,

Appellee,

v.

JULIUS KEWITZ,

Appellant.

122
APPEAL FROM
SUPERIOR COURT

COOK COUNTY.

270 I.A. 636³

Opinion filed May 24, 1933

MR. JUSTICE NEBEL DELIVERED THE OPINION OF THE COURT.

This is an appeal from a judgment in the sum of \$3,500 entered upon a verdict of a jury, in an action of trespass on the case to recover damages for injuries sustained by the plaintiff by reason of the alleged wrongful act of the defendant in operating his motor truck so as to collide with an automobile in which the plaintiff was a passenger at the intersection of Wabash Avenue and Garfield Boulevard, Chicago.

The only point made by the defendant upon this record is that the court erred in giving plaintiff's instruction No. 1, first, because it does not express the correct rule of law as to the respective rights and duties of drivers of automobiles approaching street intersections; and second, the instruction is not warranted by any allegation in plaintiff's declaration. The questioned instruction of the plaintiff is as follows:

"The court instructs the jury that if you believe and find from the evidence the defendant's motor vehicle approached the intersection of Wabash Avenue and Garfield Boulevard at the same time that the plaintiff's automobile approached said intersection, then in such event it was the duty of the defendant to give the right of way across that intersection to the plaintiff's automobile."

The accident happened at a street intersection, and the pertinent query for the jury was, which driver was guilty of negligence in the operation of the motor car that resulted in the collision of these cars.

In considering the questioned instruction it is the duty of

2011

ANTHONY WILSON, JR.

Appellant

v.

JOHN KEMPT

Appellee

CHAMBERLAIN COUNTY

270 I.A. 686

Opinion filed May 24, 1933

MR. JUSTICE HENRY DELIVERED THE OPINION OF THE COURT.

This is an appeal from a judgment in the sum of \$2,500

rendered upon a verdict of a jury, in an action of trespass on the case to recover damages for injuries sustained by the plaintiff by reason of the alleged wrongful act of the defendant in operating his motor truck so as to collide with an automobile in which the plaintiff was a passenger at the intersection of Kansas Avenue and

Central Avenue, Chicago.

The only point made by the defendant upon this record is

that the court erred in giving plaintiff's instruction No. 1, to wit:

Because it does not express the correct rule of law as to the res-

pective rights and duties of drivers of automobiles approaching street

intersections; and second, the instruction is not warranted by any

evidence in plaintiff's declaration. The questioned instruction

of the plaintiff is as follows:

"The court instructs the jury that if you believe and find from the evidence the defendant's motor vehicle approached the intersection of Kansas Avenue and Central Avenue and the plaintiff's automobile approached said intersection, then in each event it was the duty of the defendant to give the right of way to the plaintiff's automobile."

The accident happened at a street intersection, and the

pertinent query for the jury was, which driver was guilty of negligence

in the operation of the motor car that resulted in the collision of

these cars.

In reaching the questioned instruction it is the duty of

this court to consider not alone the instruction that is objected to, but also all the instructions given by the court. Among the instructions of the defendant which were marked given, is one by which the jury was advised and instructed that contributory negligence as applied in the instant case, means failure on the part of the plaintiff to exercise ordinary care and caution for his own safety, which proximately contributed in any degree to bring about the injuries for which he sues.

Then again the jury was told that if they believed from the evidence that under the circumstances defendant's automobile prior and at the time of the accident was operated with ordinary care and that the defendant did all he could to avoid the accident, he was not responsible for the collision, and the effect of the instruction is that the plaintiff cannot recover in the instant case.

From an examination of the defendant's instructions that impressed upon the jury the rules of law which apply in order to properly charge the defendant with a negligent act, the questioned plaintiff's instruction may be subject to criticism in the choice of such words as "at the same time" when the vehicles approached the intersection. If the motor cars approached the intersection at the same time, there were other circumstances for the jury to consider upon the question of which of the drivers had the right of way, but we are of the opinion that the defendant's instructions, in the main, corrected the objection made by the defendant to the instruction in question.

No point is made that the facts in this case did not warrant the verdict of the jury, or the Court's rulings; nor does the defendant make any point as to the amount of the judgment. It would seem therefore that the criticism of plaintiff's instruction does

this court to consider not alone the instruction that is objected to, but also all the instructions given by the court. Among the instructions of the defendant which were asked given, is one by which the jury was advised and instructed that contributory negligence as applied in the instant case, means failure on the part of the plaintiff to exercise ordinary care and caution for his own safety, which necessarily constituted in any degree to bring about the injuries for which he sues.

Then again the jury was told that if they believed from the evidence that at the time the defendant's automobile was operated with ordinary care and that the defendant did all he could to avoid the accident, he was not responsible for the collision, and the effect of the instruction is that the plaintiff cannot recover in the instant case.

From an examination of the defendant's instructions that instructed them the jury the rules of law which apply in order to properly charge the defendant with a negligent act, the question plaintiff's instruction may be subject to criticism in the choice of such words as "at the same time" when the vehicle approached the intersection. If the words were changed to "at the same time, there were other circumstances for the jury to consider when the question of which of the drivers had the right of way, but as far as the opinion that the defendant's instructions, in the main, reflected the question made by the defendant to the instruction in question.

No point is made that the facts in this case did not warrant the verdict of the jury, or the court's finding; and does not defendant now bring us to the amount of his judgment. It would seem therefore that the opinion of plaintiff's instructions does

not justify a reversal of the judgment, in view of the fact that the defendant's instruction cured the objection.

The second reason advanced by the defendant is that the allegations in the several counts of plaintiff's declaration did not warrant the giving of the instruction in question. The first count alleges in general terms that the defendant negligently drove his motor truck into the automobile in which the plaintiff was riding as a passenger. The fifth count alleges that the defendant negligently failed to stop his motor truck, or to change its speed or alter its course, and the sixth count, that the defendant negligently failed to check its speed and divert its course. This court in the case of Leideck v. City of Chicago, 248 Ill. App. 545, stated that where general negligence is alleged in a declaration -

"It would be proper to give such an instruction where the declaration charges negligence generally, as several of the counts in the declaration in the instant case do. That was the negligent driving of the car, because it was in violation of the method prescribed by the statute. Furthermore it was not necessary to plead the statute, but only facts which brought the violation counted upon within the statute. Chicago & A. R. Co. v. Dillon, 133 Ill. 570."

According to the rule announced by this court, the giving of this instruction upon the state of the pleadings was not erroneous.

For the reasons indicated, the judgment is affirmed.

JUDGMENT AFFIRMED.

WILSON, P.J. AND HALL, J. CONCUR.

and finally a reversal of the judgment, as that of the first trial. The defendant's testimony caused the objection. The second trial judgment of the defendant is that the allegations in the second count of the indictment are not correct and that the defendant is negligent. The first count alleges in general terms that the defendant negligently drove his motor truck into the plaintiff in view of the plaintiff was riding as a passenger. The first count alleges that the defendant negligently failed to keep his motor truck, or to change its speed or direction, and the second count, that the defendant negligently failed to check its speed and direct its course. This count is the case of negligence - duty of driver, 448 Ill. App. 2d, 1974.

That there is a declaration in a declaration -

"It would be proper to give such an instruction where the defendant's negligence is shown generally, as reversal of the doctrine in the defendant is the subject of the case. The defendant's negligence is the subject of the case, because it was in violation of the duty imposed by the statute, and only here it is not necessary to show the statute, but only that which shows the violation caused by the defendant. Ill. App. 2d, 1974.

According to the first count of this case, the defendant is negligent in view of the fact of the defendant was not negligent. For the reasons stated, the judgment is affirmed.

REVEREND ATTORNEY.

WITNESSES, J. J. AND M. J. J. J.

36187

BURNSIDE TRUST & SAVINGS BANK,
a Corporation,

Appellant,

v.

SOFIA BOGI,

Appellee.

APPEAL FROM

MUNICIPAL COURT

270 I.A. 636⁴
OF CHICAGO.

Opinion filed May 24, 1933

MR. JUSTICE NEBEL DELIVERED THE OPINION OF THE COURT.

This is an appeal by the plaintiff from an order entered by the trial court setting aside and vacating a judgment of \$1,883.30 entered by confession in favor of the Burnside Trust & Savings Bank, a corporation, against Sofia Bogi, upon a promissory note dated June 8, 1925, for \$1500, due three years after date, bearing interest at 6% per annum, and signed by the defendant and Gabor Bogi, her husband.

In this note is contained a warrant of attorney to confess judgment upon the following conditions:

"And to secure the payment of said amount we hereby authorize irrevocably, any attorney of any court of record, without process, to appear for us in such court, in term time or vacation, at any time hereafter, and confess a judgment in favor of the holder of this Note, for such amount as may appear to be unpaid thereon, together with costs and reasonable Dollars attorney's fees, and to waive and release all errors which may intervene in any such proceedings and consent to immediate execution upon such judgment, hereby ratifying and confirming all that our said Attorney may do by virtue hereof."

On April 13, 1932, the defendant filed her motion to vacate and set aside said judgment, and to dismiss the suit of the plaintiff on the ground that the court was without jurisdiction to enter the judgment, for the reason that the warrant of attorney to confess, provided for in said promissory note, was entered upon a joint warrant, and at the time the judgment by confession was entered the defendant's husband, the joint maker of the note, was dead, and that he died on March 28, 1932.

The question upon this state of the record is whether the trial court erred in vacating the judgment by confession and dismissing plaintiff's suit. The plaintiff contends that the defendant as joint

HUMPHREY TRUST & SAVINGS BANK
a Corporation

Appellant

vs.

Appellee

MUNICIPAL COURT

270 L.A. 686
OF CALIFORNIA

Opinion filed May 24, 1933

MR. JUSTICE HENRI DELIVERED THE OPINION OF THE COURT.

This is an appeal by the plaintiff from an order entered by the trial court setting aside and vacating a judgment of \$1,250.00 entered by confession in favor of the defendant. The defendant, at the time of the entry of the judgment, was a party to a promissory note dated June 1, 1932, for \$1500, due three years after date, bearing interest at 6% per annum, and signed by the defendant and her husband, her husband.

In this case as contained a warrant of attorney to confess

judgment upon the following conditions:

"That to receive the payment of said amount we hereby authorize, irrevocably, any attorney of any court of record, without process, to appear for us in such court, in such time or manner, as may be directed, and confess a judgment in favor of the plaintiff of the sum of \$1,250.00, for each amount as may appear to be unpaid thereof, together with costs and reasonable attorney's fees, and to waive and release all errors which may intervene in any such proceedings and consent to immediate execution upon said judgment, hereby ratifying and continuing all that our said attorney may do in virtue thereof."

On April 12, 1933, the defendant filed her motion to vacate and set aside said judgment, and to dismiss the writ of the plaintiff on the ground that the court was without jurisdiction to enter the judgment, for the reason that the warrant of attorney to confess provided for in said promissory note, was entered upon a joint warrant, and at the time the judgment by confession was entered the defendant's husband, the joint maker of the note, was dead, and that he died on

March 15, 1931.

The question upon this state of the record is whether the trial court erred in vacating the judgment by confession and dismissing the plaintiff's writ. The plaintiff contends that the defendant as joint

maker was jointly and severally liable, and that the court had jurisdiction to enter the judgment against the defendant, she being the surviving maker.

The defendant did not appear upon this appeal, and therefore we are without the benefit of the theory of the defendant's defense.

The plaintiff stresses the point that the note in question was both joint and several, and has called this court's attention to Sec. 3, Chap 76 of Cahill's Ill. Rev. Stat., which is as follows:

"All joint obligations and covenants shall be taken and held to be joint and several obligations and covenants."

and contends that by this provision the law makers abrogated the common rule requiring that judgments be confessed against all or none on a joint undertaking. The warrant of attorney in the promissory note is joint authority to confess judgment, and the courts of this state upon this question are in accord and hold that a joint warrant of attorney does not authorize a confession, of a judgment against the surviving maker of a note, even though the note is in its terms joint and several. Mayer v. Pick, 132 Ill. 561; Farmers Exchange Bank v. Sollars, 265 Ill. App. 98; Keen v. Bump, 286 Ill. 11. It is to be noted that in the opinions of the court the note is referred to as a joint and several note, but this fact does not affect the question that where a warrant of attorney is joint it will not authorize a several judgment.

It is further contended by the plaintiff that the defendant's motion is not confined solely to the question of want of jurisdiction, but is coupled with a motion to dismiss the suit, and by such motion the defendant is in court for all purposes. The motion is in part as follows:

maker was jointly and severally liable, and that the court had jurisdiction to enter the judgment against the defendant, she being the

The defendant did not appear upon this appeal, and there-
fore we are without the benefit of the theory of the defendant's

The plaintiff stresses the point that the note in question was both joint and several, and has called this court's attention to
Sec. 5, Chap. 70 of Cahill's Ill. Rev. Stat., which is as follows:
"All joint obligations and covenants shall be taken and
held to be joint and several obligations and covenants."

and contends that by this provision the law makes identical the
common rule regarding joint judgments be confessed against all or none
on a joint undertaking. The warrant of attorney in the preliminary note
is joint authority to confess judgment, and the words of this state
upon this question are in accord and hold that a joint warrant of
attorney does not authorize a confession of a judgment against the
outgoing note of a note, even though the note is in the joint
and several. Warrant v. Bank, 123 Ill. 111; Bank v. Warrant, 123 Ill. 111
123 Ill. 111; Bank v. Warrant, 123 Ill. 111 is so re-
solved that in the opinion of the court the note is referred to as
a joint and several note, but this fact does not affect the question
that where a warrant of attorney is joint it will not authorize a
several judgment.

It is further contended by the plaintiff that the defendant's
action is not barred solely in the question of joint or several
but is coupled with a motion to dismiss the suit, and by such motion
the defendant is in court for all purposes. The motion is in part

is follows:

"Your petitioner further represents that the warrant of attorney, giving the plaintiff power to confess judgment was a joint warrant, and that the Court has no jurisdiction to enter the said judgment, and that the judgment against your petitioner is void, in that the warrant being joint is regarded an entirety and as such is indivisible and that the Courts have repeatedly held that when one maker dies and the warrant is joint, judgment should not be confessed against the survivor.

Wherefore, your petitioner prays that the said judgment entered herein on, to wit: The 31st day of March, 1932, be vacated and set aside and held for naught and that the case be dismissed for want of jurisdiction."

The appearance of the defendant is limited by her motion to question the jurisdiction of the court to enter the judgment upon the ground that the warrant of the attorney to confess is joint and that upon the death of one of the makers judgment should not be confessed against the survivor. The motion does not indicate a general appearance by the defendant, but rather that the appearance is limited to the question of the jurisdiction of the court. Upon the present state of the record the defendant is not in court, except for a special purpose, and we are of the opinion that the trial court did not err in ordering the suit dismissed for want of jurisdiction of the defendant. In order to bring the defendant into court it will be necessary that she be served with summons in an action instituted by the plaintiff upon the promissory note in question.

The order heretofore entered by the trial court is affirmed.

ORDER AFFIRMED.

WILSON, P.J. AND HALL, J. CONCUR.

"Your position further requires that the return of
attorney, after the plaintiff's return to the court, be
a joint return, and that the court has no jurisdiction to
enter the said judgment, and that the judgment should be
joint, in that the return being joint, in that the return
is returned as a return, and as such is inadmissible and that
the court has previously said that when the return is made
the return is joint, judgment should not be entered
against the survivor.
Therefore, your position says that the said judgment
entered herein on, as with the first day of March, 1913, as
entered and said and said for judgment and that the case
be dismissed for lack of jurisdiction."

The appearance of the defendant is limited by her motion to
question the jurisdiction of the court to enter the judgment upon
the ground that the return of the attorney to court is joint and
that upon the death of one of the parties judgment should not be
entered against the survivor. The motion does not indicate a
general appearance by the defendant, but rather that the appearance is
limited to the question of the jurisdiction of the court. Upon the
return of the return of the defendant is not in court, return for
a special return, and as at the opinion that the trial court
did not see in entering the said judgment for lack of jurisdiction
of the defendant, in order to bring the defendant into court it will
be necessary that she be served with summons in an action instituted
by the plaintiff upon the defendant's note in question.

The order heretofore entered by the trial court is affirmed.
ORDER AFFIRMED.

WITSON, C.J. AND SALL, J. JUDGES.

36184

J. W. HOLT,

Plaintiff in Error,

v.

LOUIS PRANGL, JR.,

Defendant in Error.

WRIT OF ERROR TO

MUNICIPAL COURT

OF CHICAGO.

270 I.A. 636⁵

Opinion filed May 24, 1933

MR. JUSTICE NEBEL DELIVERED THE OPINION OF THE COURT.

This case is in this court upon a writ of error to the Municipal Court of Chicago. The record filed herein is a common law record, from which it appears that an action was filed in the Municipal Court of Chicago by the plaintiff against the defendant. A trial was had before the court without a jury, and the court found the issues against the defendant and assessed the plaintiff's damages in the sum of \$750. Defendant's motion for a new trial and in arrest of judgment was overruled, and judgment was entered on the Court's finding for the plaintiff and against the defendant in the sum herein above mentioned. From this judgment the defendant prayed an appeal, which was not perfected.

This writ of error is prosecuted by the plaintiff because of errors that appear on the face of the record, and he questions the jurisdiction of the court below to enter on July 14, 1932, an order vacating the judgment for the plaintiff for \$750, and to grant the defendant a new trial. The record is as follows:

On June 8, 1932, a motion of the defendant was entered to vacate the judgment of May 9, 1932, and continued to June 17, 1932. No further continuance of the motion appears of record, or action taken by the court on the defendant's motion. On June 24, 1932, the court continued defendant's motion to vacate to July 14, 1932, and on that date the court entered an order vacating the judgment dated May 9, 1932, and granting a new trial to the defendant.

The record before this court was filed on the 13th day of September, 1932, together with the plaintiff's abstract and brief.

MUNICIPAL COURT

OF CHICAGO

370 I.A. 636

Opinion filed May 24, 1933

M. JUSTICE HEREIN REVERES THE OPINION OF THE COURT.

This case is in this court upon a writ of error to the

Municipal Court of Chicago. The record filed herein is a

law record, from which it appears that an action was filed in the

Municipal Court of Chicago by the plaintiff against the defendant.

A trial was had before the court without a jury, and the court found

the issues against the defendant and assessed the plaintiff's damages

in the sum of \$750. Defendant's motion for a new trial and an

arrest of judgment was overruled, and judgment was entered on the

Court's finding for the plaintiff and against the defendant in the

sum herein above mentioned. From this judgment the defendant prayed

an appeal, which was not perfected.

This writ of error is prosecuted by the plaintiff because

of errors that appear on the face of the record, and he prays that the

jurisdiction of the court below be set aside on July 14, 1933, and

order vacating the judgment for the plaintiff for \$750, and to grant

the defendant a new trial. The record is as follows:

On June 8, 1932, a motion of the defendant was entered to

vacate the judgment of May 2, 1932, and continued to June 17, 1932,

He further continuance of the motion appears of record, on motion taken

by the court on the defendant's motion. On June 24, 1932, the court

continued defendant's motion to vacate to July 14, 1932, and on

that date the court entered an order vacating the judgment dated

May 2, 1932, and granting a new trial to the defendant.

The record before this court was filed on the 12th day of

The plaintiff contends that the trial court lost jurisdiction to vacate the judgment of May 9, 1932, when it entered the order on July 14, 1932 to vacate said judgment. The motion by the defendant to vacate the judgment was made and entered on June 8, 1932, and was in apt time, being on the thirtieth day after the judgment was entered in the Municipal Court. Under the Municipal Court procedure the court has jurisdiction to entertain such a motion, and by continuance reserve further jurisdiction when the motion of the defendant was continued to June 17, 1932. At that time, however, no further continuance was granted or action taken by the court on the defendant's motion. Nothing appears in the record until the defendant's motion of June 8, 1932, was continued on June 24, 1932, to July 14, 1932, and on that date the court vacated the judgment on defendant's motion. When the motion of the defendant was not considered or jurisdiction reserved on June 17, 1932, the court lost jurisdiction to enter the order of June 24, 1932, or to continue the motion to July 14, 1932.

The defendant sought to remedy this omission by his motion for leave to file an additional record, and from this additional record it appears that on October 19, 1932, a draft order was entered by the trial court nunc pro tunc as of June 17, 1932, continuing the defendant's motion to vacate the judgment of May 9, 1932, until June 24, 1932. This nunc pro tunc order of October 19, 1932, was entered after this court had jurisdiction. The plaintiff in error had caused a scire facias to be served on the defendant, and the plaintiff's record was filed, together with his abstract of this record, and his brief and argument, on September 13, 1932, and that was before the nunc pro tunc order of October 19, 1932, was entered, or notice of such motion was given to the plaintiff by the defendant.

The plaintiff was entitled when he brought suit in this

The plaintiff contends that the trial court lost jurisdiction to vacate the judgment of May 2, 1933, when it entered the order on July 14, 1933 to vacate said judgment. The motion by the defendant to vacate the judgment was made and entered on June 2, 1933, and was in due time, being on the thirtieth day after the judgment was entered in the municipal court. Under the municipal court procedure the court had jurisdiction to entertain such a motion, and by continuance reserve further jurisdiction when the motion of the defendant was continued to June 17, 1933. At that time, however, no further continuance was granted or motion taken by the court on the defendant's motion. Having reserve in the court until the return of the motion of June 2, 1933, was continued on June 17, 1933, to July 14, 1933, and on that date the court vacated the judgment on the defendant's motion. When the motion of the defendant was not considered or jurisdiction reserved on June 17, 1933, the court lost jurisdiction to enter the order of June 24, 1933, or to continue the motion to July 14, 1933.

The defendant sought to remedy this omission by his motion for leave to file an additional record, and from this additional record is shown that on October 12, 1933, a writ was set aside by the trial court upon the basis of June 17, 1933, continuing the defendant's motion to vacate the judgment of May 2, 1933, until June 14, 1933. This order was entered on October 12, 1933, and entered after this court had jurisdiction. The plaintiff in error has shown a writ of error to be issued on the grounds that the plaintiff's record was filed together with his answer of this record, and his brief and argument, on September 13, 1933, and that was before the writ was set aside of October 12, 1933, was entered, or notice of such motion was given to the plaintiff by the defendant. The plaintiff was entitled when he brought suit in this

court to have the order vacating plaintiff's judgment set aside. The jurisdiction acquired by this court cannot be ousted by subsequent proceedings in the trial court, and the jurisdiction of the Appellate Court cannot be vacated by a nunc pro tunc order entered by the trial court. Barnard v. Dettenmaier, 89 Ill. App. 341.

This court in an opinion on a somewhat similar question in the case of Franz v. Canton Rolling Mill Corp., Gen. No. 35937, not yet reported, said:

"The defendant before this court insists that the trial court erred in entering the judgment and has called to our attention the case of the Illinois Land & Loan Co. v. McCormick, et al. 61 Ill. 322. In that case after the record was filed in the Supreme Court and errors assigned, the decree was amended in the court below at a subsequent term to the one at which the decree was entered. The Supreme Court held that such practice was irregular and that the Supreme Court must and did decide the case upon the record originally filed. The instant case is properly in the Appellate Court, and this court has jurisdiction. This jurisdiction cannot be ousted by the subsequent order amending the judgment entered by the trial court. Barnard v. Dettenmaier, 89 Ill. App. 341."

The motion of the defendant for leave to supply an additional record was reserved to the hearing, and from the conclusions indicated in this opinion the motion will be denied and the order of July 14, 1932, vacating the judgment entered on May 9, 1932, is set aside and held for naught, and the judgment to stand with directions to the Municipal Court of Chicago to enter orders consistent with the views herein expressed.

ORDER REVERSED AND CAUSE REMANDED
WITH DIRECTIONS.

WILSON, P.J. AND HALL, J. CONCUR.

court to have the order vacating Plaintiff's judgment set aside.
The jurisdiction acquired by this court cannot be ousted by some-
thing proceeding in the trial court, and the jurisdiction of the
Appellate Court cannot be ousted by a writ ex parte order entered
by the trial court. Harwood v. Harwood, 22 Ill. App. 2d 111.
This court in an opinion on a somewhat similar question
in the case of Tracy v. Tracy, 22 Ill. App. 2d 111, said:

Not as reported, with:
"The defendant below this court insists that the trial
court tried in violation of the judgment and was called to the
attention of the court at the Illinois Land & Loan Co. v.
Harwood, 22 Ill. App. 2d 111. In that case after the record
was filed in the Appellate Court and errors assigned, the
court was asked in the court below at a subsequent term
to the one of which the decree was entered. The Appellate
Court held that such practice was irregular and that the
Appellate Court must not take the case upon the record
originally filed. The instant case is precisely as the
Appellate Court, and this court has jurisdiction. This
jurisdiction cannot be ousted by the trial court's order
vacating the judgment entered by the trial court. Harwood
v. Harwood, 22 Ill. App. 2d 111."

The action at the defendant for leave to supply an
additional record was reserved to the hearing, and from the consid-
eration indicated in this opinion the action will be denied and the
order of July 14, 1932, vacating the judgment entered on May 8,
1932, is set aside and held for nought, and the judgment to stand
with directions to the Honorable Court of Chicago to enter orders
consistent with the views herein expressed.

ORDER REVERSED AND DISCHARGED
WITH DIRECTIONS.

WILLIAM J. CONNELLEY, J. CLERK.

36195

ORIGIN STATE BANK, a Corporation,

Defendant in Error,

v.

ANNA AAFLEI,

Plaintiff in Error.

ERROR TO

MUNICIPAL COURT

OF CHICAGO.

270 I.A. 637¹

Opinion filed May 24, 1933

MR. JUSTICE NEBEL DELIVERED THE OPINION OF THE COURT.

The plaintiff filed a suit in assumpsit in the Municipal Court of Chicago on three promissory notes signed by the defendant, and upon its motion a judgment by confession was entered upon a warrant to confess in the sum of \$1,509.83. The statement of claim alleges that the plaintiff's claim is for money due on three notes, aggregating the sum of \$5,450, which were duly executed by the defendant and delivered to the plaintiff, the legal holder, and that the amount due on said notes after allowing certain credits is \$1,370.83, exclusive of attorney's fees.

On June 10, 1931, the defendant filed her petition to vacate the judgment by confession, which was denied by the court, and on July 2, 1931, after leave of court, the defendant filed her second amended petition to vacate the judgment, which the court refused to consider sufficient, and the defendant brings this cause to this court upon a writ of error.

No evidence was heard by the court other than the facts set up in the amended petition of the defendant, which are that the judgment by confession was entered on May 28, 1931; that the defendant had no knowledge of the entry of the judgment until the 6th day of June, 1931; that the judgment was obtained on three notes aggregating \$5,450, and attached to the notes were certain securities and a mortgage securing the payment of a note for \$5,000, executed by the defendant; that a sale of the collateral attached to the note, together with the note and the mortgage was had; that from the money

RETURN TO

GRAND STATE BANK, a Corporation,

MUNICIPAL COURT

Defendant in Error,

OF CHICAGO.

JAMES M. KELLY,

Plaintiff in Error.

Opinion filed May 24, 1933

MR. JUSTICE REBER DELIVERED THE OPINION OF THE COURT.

The plaintiff filed a writ in remonstrance in the Municipal

Court of Chicago on March 15, 1933, signed by the defendant.

and upon the motion a judgment by confession was entered upon a

warrant to confess in the sum of \$1,800.00. The statement of claim

alleges that the plaintiff's claim is for money due on three notes,

representing the sum of \$1,800.00, which were duly assigned by the

defendant and delivered to the plaintiff, the legal holder, and that

the amount due on said notes after allowing certain credits is

\$1,370.83, exclusive of attorney's fees.

On June 10, 1931, the defendant filed her petition to

vacate the judgment by confession, which was denied by the court, and

on July 1, 1931, after leave of court, the defendant filed her second

amended petition to vacate the judgment, which the court refused to

consider sufficient, and the defendant brings this cause to this

court upon a writ of error.

No evidence was heard by the court other than the facts set

up in the amended petition of the defendant, which are that the judg-

ment by confession was entered on May 22, 1931; that the defendant

had no knowledge of the entry of the judgment until the 6th day of

June, 1931; that the judgment was obtained on three notes aggregating

\$5,480.00, and attached to the notes were certain recitations and a

mortgage securing the payment of a note for \$8,000.00, executed by the

defendant; that a sale of the collateral attached to the note,

together with the note and the mortgage was had; that from the money

received from the sale of defendant's collateral the plaintiff reduced the sum due on said notes to \$1,370.83; that the purported sale of the defendant's collateral was fictitious and merely a sham sale and that in fact no sale was had; that the plaintiff purchased at its own purported sale the \$5,000 note secured by a mortgage, for \$3,000, and that the sale was so grossly inadequate as to amount to a fraud.

It appears that the defendant had dealings with the plaintiff for the purchase of stock, and that the notes and collateral attached were executed to make good certain margins needed, and finally by reason of the inability of the defendant to pay the money or deliver more stock to make good the margins claimed by the plaintiff to be necessary to protect the collateral the plaintiff made the pretended sale of the collateral.

It is stated that the so-called purchases and sales of stock made by the plaintiff for the defendant were sham purchases and sales and were fictitious, and that the defendant believes that no stocks or securities were in fact bought or sold.

It further appears that in the transactions it was understood and agreed between the plaintiff and the defendant that no stock or securities were to be actually received or delivered; that it was the purpose of the plaintiff to settle all gains or losses by the payment or receipt of the differences between the market price at the time of purchase and at the time of settlement with the defendant; that the amount claimed by the plaintiff represents an unpaid balance due from the defendant of the market differences, and is therefore illegal and void and in violation of the Criminal Code of the State of Illinois.

The plaintiff bank failed to appear in this court, and because of this failure we are without the plaintiff's reason why the order of the court in this case should be sustained.

received from the sale of defendant's collateral the plaintiff reduced
the sum due on said notes to \$1,770.88; that the purported sale of
the defendant's collateral was fictitious and merely a sham sale and
that in fact no sale was had; that the plaintiff furnished at its own
purported sale the \$5,000 note covered by a mortgage for \$1,000, and
that the sale was so grossly inadequate as to amount to a fraud.
It appears that the defendant had dealings with the plain-
tiff for the purchase of stock, and that the notes and collateral
advanced were intended to cover said stock and other securities needed, and finally
by reason of the insolvency of the defendant to pay the money on
deliver more stock to make good the margins claimed by the plaintiff
to be necessary to protect the collateral the plaintiff made the
purported sale of the collateral.
It is stated that the so-called purchases and sales of
stock made by the plaintiff for the defendant were sham purchases and
sales and were fictitious, and that the defendant delivered that he
stocks or securities were in fact bought or sold.
It further appears that in the transactions it was understood
and agreed between the plaintiff and the defendant that no stock or
securities were to be actually received or delivered; that it was the
purpose of the plaintiff to settle all gains or losses by the payment
or receipt of the difference between the market price at the time of
purchase and at the time of settlement with the defendant; that the
amount claimed by the plaintiff represents an unpaid balance due from
the defendant of the market difference, and is therefore illegal and
void and is violative of the Criminal Code of the State of Illinois.
The plaintiff bank failed to appear in this court, and
because of this failure we are without the plaintiff's reason why the
order of the court in this case should be sustained.

The defendant contends that Sec. 130, Par. 308, Chap. 38, of the Criminal Code, Cahill's Ill. Rev. Stat. 1931, is a defense to that action. This section provides in part as follows:

"Whoever contracts to have or give to himself or another the option to sell or buy, at a future time, any grain, or other commodity, stock, etc. * * * where it is at the time of making such contract intended by both parties thereto that the option, whenever exercised, or the contract resulting therefrom shall be settled, not by the receipt or delivery of such property but by the payment only of differences in prices thereof, * * * shall be fined, etc. * * * and all contracts made in violation of this section shall be considered gambling contracts and shall be void."

The question to be solved for the purpose of the defendant's motion is, did the facts set up a meritorious defense and did the defendant act promptly and with due diligence. The charge is made by the defendant as the basis of her defense that the stock transactions with the plaintiff were fictitious and that no stocks were bought or sold, and, according to the understanding of the parties, settlement was not made by the sale and delivery of stock, but rather by adjustment of differences in the market value at the time of purchase and at the time of settlement. It is also charged as a part of her defense that the sale of the defendant's collateral was fictitious, and that in fact no sale was had; that the sale of the \$5,000 mortgage securing the payment of the \$3,000 note was grossly inadequate and was a fraud upon the rights of the defendant. These facts would indicate a defense to this action.

This court is of the opinion that the motion of the defendant, supported as it is by the facts contained in the amended petition, is sufficient to warrant the submission of her defense to a jury.

The order of the court denying the defendant's motion is reversed and the cause is remanded with directions that the judgment heretofore entered stand as security and that leave be granted the defendant to file her affidavit of merits, and for such other or further orders as may be consistent with this opinion.

WILSON, P.J. AND HALL, J.
CONCUR.

ORDER REVERSED AND THE CAUSE
REMANDED WITH DIRECTIONS.

that section. This section provides in part as follows:

"of the United States, O'Brien's Bill, Nov. 1941, is a violation of the defendant contains that Sec. 130, Par. 308, Chap. 22,

"...contractors to have or give to himself or another
the right to sell or buy, at a future time, any grain,
or other commodity, stock, etc., where it is at the
time of making such contract intended by both parties
thereof that the option, whenever exercised, on the con-
tract remaining thereafter shall be settled, not by the
market or delivery of such property but by the payment
only of difference in value between, " " shall be
liquidated, etc." and all contracts made in violation
of this section shall be considered gambling contracts
and shall be void."

The question to be solved for the purpose of the defendant's motion is, did the facts set up a meritorious defense and did the defendant act promptly and with due diligence. The charge is made by the defendant as the basis of her defense that the stock transactions with the plaintiff were fictitious and that no stock was bought or sold, and, according to the understanding of the parties, settlement was not made by the sale and delivery of stock, but rather by adjustment of differences in the market value of the stock at purchase and at the time of settlement. It is also charged as a part of her defense that the sale of the defendant's collateral was fictitious, and that in fact no sale was had; that the sale of the stock, not mortgage securing the payment of the \$2,000 note was really independent and was a transfer upon the rights of the defendant. These facts would indicate a defense is well taken.

This court is of the opinion that the motion of the defendant, supported as it is by the facts contained in the amended petition, is sufficient to warrant the suspension of her defense to a jury.

The order of the court denying the defendant's motion is reversed and the cause is remanded with directions that the judgment be set aside and that leave be granted the defendant to file her affidavit of merits, and for such other or further relief as may be considered with this opinion.

36206

W. R. BASSIOK,

Appellant,

v.

W. B. BURR and BURGOLD CORPORATION,
a Corporation,

Appellees.

APPEAL FROM

MUNICIPAL COURT

OF CHICAGO.

270 I.A. 637^L

Opinion filed May 24, 1933

MR. JUSTICE MENEL DELIVERED THE OPINION OF THE COURT.

This action was instituted in the Municipal Court of Chicago on the 3rd day of September, 1930, by the plaintiff against the defendant. It is sought to recover \$2500, which sum the plaintiff paid the defendant corporation upon a contract to purchase stock from this corporation upon the ground that the plaintiff was not qualified under the provisions of an act entitled the "Illinois Securities Law," Chap. 32, Par. 254, Cahill's Ill. Rev. Stat. to sell the capital stock of the defendant company.

This cause came on for trial and was heard by the court and a jury. After hearing the deposition of W. R. Bassiock read, the court directed the jury to find the issues against the plaintiff, and upon this verdict entered judgment, from which judgment the plaintiff appeals to this court.

The facts are not in dispute. It is admitted by the pleadings that the defendant corporation was organized under the laws of the State of Illinois; that all of its stock was issued to W. B. Burr, D. Goldsmith and W. E. Eckert; that one of defendant's officers, W. B. Burr, solicited the plaintiff in Chicago to purchase stock of this corporation, and as a result a written contract was entered into for the purchase of stock by the plaintiff from the defendant corporation, and the plaintiff paid the defendant the sum of \$2500 for stock of the defendant corporation. This agreement was entered into on the 11th day of October, 1929 between the plaintiff and the defendant corporation. From its terms, the plaintiff was to acquire one-third of the

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the court directed the jury to find the issues against the plaintiff, and upon this verdict entered judgment, from which judgment the plaintiff appeals to this court.

The facts are not in dispute. It is admitted by the plaintiff-

The above information was obtained from the files of the FBI New York Office and is being furnished to you for your information.

and the Plaintiff will be relieved of the tax on the purchase of stock by the Plaintiff from the defendant corporation, corporation, and as a result Plaintiff's interest was entered into the M. D. C. 1950. The Plaintiff is entitled to a refund of the tax on the purchase of stock by the Plaintiff from the defendant corporation, corporation, and as a result Plaintiff's interest was entered into the M. D. C. 1950.

From the time the Plaintiff was so severely assaulted at the day of October, 1910 between the Plaintiff and the defendant together the defendant corporation. This agreement was entered into on the 11th

total 500 shares of the common stock of the defendant corporation upon the payment of the purchase price of \$25,000, this sum to be furnished by the plaintiff when needed by the corporation. The purpose of this business was to manufacture and market an attractor device for radios, and other devices invented by one Goldsmith, together with a white metal called "Surgonite." The plaintiff was to act as business executive at its La Grange plant, but the business failed to be profitable and as a result the plaintiff seeks to recover the money paid into the enterprise.

No charge is made of fraud used to obtain the execution of the contract, or fraudulent representations which led to its execution. It is admitted that no statements such as are required by the provisions of the Illinois Securities Law were filed with the Secretary of State at the time the contract was signed by the parties herein. It is contended by the plaintiff that the defendant corporation was not in existence long enough to have an established income and that, therefore the security in question was a Class "B" security based upon prospective income, unless the stock comes within the class of securities defined as Class "B" securities. This section of the Securities Law, Chap. 32, Par. 258, Cahill's Ill. Rev. Stat., in force at the time the contract was entered into, is, in part, in these words:

"Sec. 5. Securities in Class "B", being exempted sales, shall include: (1) An isolated sale of any security by a bona fide owner thereof, or his representative, for the owner's account, such sale not being made in the course of repeated and successive transactions of a like character, and such owner not being a broker or dealer in securities or an underwriter of such securities."

This securities act is a penal statute, one which imposes a forfeiture or penalty for transgressing its provisions or for doing a thing prohibited. Vestal Co. v. Robertson, 277 Ill. 425. It should be strictly construed, and matters which are not clearly included cannot be brought within the operation of such statute by mere construction.

total 500 shares of the common stock of the defendant corporation upon the payment of the purchase price of \$15,000. This was to be furnished by the plaintiff when needed by the corporation. The purpose of this business was to manufacture and market an electric device for traction, and other devices invented by one Delamater, together with a white metal called "Baryonite". The plaintiff was to act as business executive at the defendant's plant, and the business failed to be profitable and as a result the plaintiff seeks to recover the money paid into the enterprise.

No charge is made of fraud used to obtain the execution of the contract, or fraudulent representations which led to its execution. It is admitted that no statements such as are required by the provisions of the Illinois Securities Law were filed with the Secretary of State at the time the contract was signed by the parties herein. It is contended by the plaintiff that the defendant corporation was not in existence long enough to have an established income and that, therefore the security in question was a Class "B" security based upon prospective income, unless the stock comes within the class of securities defined as Class "B" securities. This section of the Securities Law, Chap. 12, Sec. 235, Illinois Rev. Stat., is in force at the time the contract was entered into, is, in part, in

These words:

"Sec. 235. Securities in Class 'B'. - Every security which shall include: (1) an isolated sale of any security by a person other than himself, at his representative, for the purpose of raising a security, which sale was part of a series of repeated and successive transactions of a like character, and which were not being a broker or dealer in securities or an issuer of such securities."

This securities act is a penal statute, one which imposes a forfeiture or penalty for transgressing its provisions at the date a thing prohibited. Vestal vs. v. Robertson, 277 Ill. 432. It should be strictly construed, and matters which are not clearly included cannot be brought within the operation of such statute by mere construction.

C. R. I. & P. Ry. Co. v. The People, 217 Ill. 164.

The language of the pertinent part of Section 5 of the act referred to is clear. The only question is was the defendant a bona fide owner of the stock sold to the plaintiff within the meaning of this section. It appears from the record that the defendant is a corporation and was the owner of the stock in question, and that the sale was an isolated transaction which grew out of the contract between the plaintiff and the defendant corporation.

The plaintiff seeks to impose a liability in this transaction upon the theory that the defendant is not included in Sec. 5, in that it was not the individual owner of the stock contracted to be sold. In construing this section the general rule announced by the Supreme Court in the case of People v. Goodhart, 248 Ill. 373, is pertinent and applicable to the question before this court. This rule is that under clause 5 of section 1, Chap. 131 of Hurd's Stats. (1909) of the act concerning the construction of statutes, the word "person" or "persons", as well as all words referring to or importing persons, may extend to and be applied to corporations as well as individuals. This rule applies to the corporation, within the meaning of the act, as being the owner of the stock contracted to be sold to the plaintiff. This section was changed by an amendatory act enacted by the legislature subsequent to the date of the contract in this case, reading as follows:

"Sec. 5. Securities in Class "B" being exempted shall include:

The sale in a bona fide manner of any security by or on behalf of a vendor who is not an issuer, or underwriter thereof, or a dealer and broker, and who, being a bona fide owner of such security, disposes of his own property for his own account."

As to the contention of the plaintiff upon this question, we have considered the prior act relating to the same subject, and it is apparent that the later legislation excluded the vendor, who is the issuer, from its operation, and that the amendatory act applies only to contracts or sales made subsequent to the passage by the legislature

that the latter legislation excluded the vendor, who is the
tenant, from its operation, and that the amendments not applied only
to contracts or sales made subsequent to the passage of the said statute.

of the amendatory legislation. Soby v. The People, 134 Ill. 66.

We are unable to agree with the plaintiff that the defendant corporation was excluded, within the meaning of the act, from making an isolated sale of securities under the provisions of section 5, in force at the time the contract was signed. The section, which was subsequently amended, excluding the sale by a vendor who is an issuer or underwriter, does not apply to the contract which was entered into by the parties in this case. The plaintiff cites as authority the case of Laurson v. Memering & Co. 260 Ill. App. 515, as controlling upon the question that the sale of the securities by the defendant corporation does not come within Class "B" its being an isolated sale by the owner and therefore exempt under the provisions of the securities law. The precise question before this court was not before us in the case relied upon by the plaintiff.

The plaintiff has called to our attention other objections, but in view of the conclusions we have reached, it will not be necessary to consider them, and what we have said disposes of this appeal.

Accordingly, the judgment entered by the trial court is affirmed.

JUDGMENT AFFIRMED.

WILSON, P.J. AND HALL, J. CONCUR.

of the respondent's legislation, JOHN V. THE BANK, 122 Ill. 66.

We are unable to agree with the plaintiff that the

defendant corporation was excluded, within the meaning of the act,
from making an isolated sale of securities under the provisions of
section 2, in force at the time the contract was signed. The section,
which was subsequently amended, excluding the sale by a vendor who
is an issuer or underwriter, does not apply to the contract which was
entered into by the parties in this case. The plaintiff cites as
authority the case of Lawrence v. Lawrence & Co., 200 Ill. App. 110,
as establishing upon the question that the sale of the securities by
the defendant corporation does not come within Class "B" the being
an isolated sale by the owner and therefore exempt under the pro-
visions of the securities law. The precise question before this
court was not before us in the case relied upon by the plaintiff.

The plaintiff has called to our attention other objections,

but in view of the questions we have reached, it will not be
necessary to consider them, and what we have said disposes of this

appeal.

Accordingly, the judgment entered by the trial court is

affirmed.

JUSTICE DELIVERED.

WILSON, P. J. AND HALL, J. CONCUR.

38852

WILLIAM S. HEFFERAN, Trustee,

Appellee,

v.

MAURICE ROSENTHAL, et al.,

Defendants.

On the Appeal of
GEORGE E. MITTLEMAN,

Appellants.

APPEAL FROM

INTERLOCUTORY ORDER,

CIRCUIT COURT OF

COOK COUNTY.

270 I.A. 637³

Opinion filed May 24, 1933

MR. JUSTICE HEBEL DELIVERED THE OPINION OF THE COURT.

This is an appeal by George E. Mittleman, one of the defendants and part owner of the equity of redemption, from an interlocutory order entered on January 10, 1933, appointing a receiver of the premises involved in a foreclosure proceeding.

The complainant as trustee filed on January 6, 1933, his bill to foreclose the premises described in the trust deed, and as a part of the relief prayed for, asked for the appointment of a receiver. On complainant's motion, before an answer had been filed by the defendants, but upon notice to George E. Mittleman and E. Freeman, who have title to the premises in question, the court entered an order appointing James Turner receiver of the described premises.

The bill charges that Maurice Rosenthal and his wife, on May 28, 1928, executed and delivered 66 promissory notes aggregating the sum of \$75,000, bearing even date with said trust deed, all bearing interest at 6½ per cent per annum, payable semi-annually, and evidenced by 476 interest coupons. The payment of these notes was secured by a trust deed conveying the title of the described real estate to the complainant as trustee.

The bill further charges defaults in the payment of notes numbered 15 to 18, and 21 to 40, except note No. 23, and in the payment of interest coupons due on said principal notes, and thereupon

WILLIAM E. HENNING, Trustee,

Applicant,

v.

MAURICE ROSENTHAL, et al.,

Defendants.

On the appeal of
GEORGE E. WITTMAN,

Appellant.

Opinion filed May 24, 1933

MR. JUSTICE BREWER delivered the opinion of the court.

This is an appeal by George E. Wittman, one of the

defendants and sole owner of the equity of redemption, from an order

of the court entered on January 10, 1933, appointing a receiver of

the premises involved in a foreclosure proceeding.

The complaint as trustee filed on January 6, 1933, his

bill is to foreclose the premises described in the trust deed, and as

a part of the relief prayed for, asked for the appointment of a

receiver. On complainant's motion, before an answer had been filed

by the defendants, but upon notice to George E. Wittman and E.

Wittman, who have filed in the premises in question, the court entered

an order appointing James Turner receiver of the described premises.

The bill charges that Maurice Rosenthal and his wife, on

May 22, 1928, executed and delivered to plaintiff a mortgage

the sum of \$75,000, bearing even date with said trust deed, all

bearing interest at 6% per cent per annum, payable semi-annually, and

advanced by the interest coupons. The payment of these notes was

secured by a trust deed conveying the title of the described real

estate to the complainant as trustee.

The bill further charges defaults in the payment of notes

amounted to \$12.18, and \$1.25 to \$2.50, respectively, and in the pay-

ment of interest coupons due on said principal notes, and thereupon

270 I.A. 637

the complainant as trustee and the legal holder of all of said principal notes, except Nos. 43 to 45 inclusive, and the interest coupons, and because of said defaults, declared the entire indebtedness due and payable.

It is also charged in the bill that because of defaults in the payment of the promissory notes a receiver should be appointed, and that the property is scant and meager security for the moneys due, and that George E. Mittelman has title to an undivided three-fourths interest, and E. Freeman to an undivided one-fourth interest in and to the real estate described in the trust deed.

The bill of complaint was verified by the complainant. Upon this appeal the defendant George E. Mittelman contends that the bill is improperly verified, and that there was not sufficient basis for the court to act in appointing a receiver.

The appointment of the receiver in the instant case is upon facts charged in the bill of complaint, and the oath subscribed by the complainant is in part as follows:

"that he knows the contents thereof and that the same is true in substance and in fact, except as to such matters and things as are therein stated and charged to be on information and belief, and as to those matters and things he believes it to be true."

This oath, in the opinion of the court, is sufficient and complies with the rule that the affidavit subscribed to must be an absolute verification of all the allegations of the bill, except where the bill expressly states the allegations therein stated to be on information and belief. Roman v. Humphreys, 220 Ill. App. 502; Stephenson v. Porter, 191 Ill. App. 303; Leck v. Baldwin County Colonization Co. 178 Ill. App. 93; Parish v. Vance, 110 Ill. App. 59; Stirlen v. Neustadt, 50 Ill. App. 378.

The bill charges, in general terms, that the premises are scant and meager security. This charge is but the conclusion of the

the obligation as between and the legal holder of all of said
promissory notes, amounting to \$250,000, and the interest
thereon, and because of said balance, declared the entire indebted-

It is also changed in the bill that because of default in
the payment of the promissory notes a receiver should be appointed,
and that the property be sold and money received for the money
due, and that George A. Wittmann have title to an undivided three-
fourths interest, and E. Freeman to an undivided one-fourth interest
in and to the real estate described in the trust deed.

The bill of complaint was verified by the complainant.
This bill against the defendant George A. Wittmann and E. Freeman
the bill is improperly verified, and that there was not sufficient
basis for the court to set in appointing a receiver.
The appointment of the receiver in the instant case is
wrongly set aside in the bill of complaint, and the bill is amended
by the complainant in its new form as follows:

That he claims the contents thereof and that the same be
from its substance and is true, except as to such matters
and things as are therein stated and changed to be as in
the bill of complaint, and as to those matters and things he
believes to be true.

This bill, in the opinion of the court, is sufficient and
correct and the bill is amended as follows:
absolute verification of all the allegations of the bill, except
where the bill expressly states the allegations therein stated to be
on information and belief. Edward v. Hunsicker, 120 Ill. 400, 307;
Frederick v. Carter, 101 Ill. 100, 297; Law v. Chicago County
Insurance Co., 120 Ill. 400, 307; English v. Yarnall, 119 Ill. 400, 307;
English v. English, 119 Ill. 400, 307.

The bill changed, in general terms, and the provisions of
the bill are hereby amended. This change is for the correction of the

pleader and is not helpful in determining the value of the premises. It should have been more specific so that the court could determine from the pleadings the value of the property, and from a consideration of the facts and circumstances set forth in the bill, determine whether the premises are meager security for the amount secured by the trust deed. Strauss v. Georgian Bldg. Corp., 261 Ill. App. 284; Frank v. Siegel, 263 Ill. App. 316; Reliance Trust Co. v. Skanski, 262 Ill. App. 629.

It also appears from the bill that this statement is made:

"that no one is keeping said premises in repair or in good condition; that by reason of the negligence of the defendants, who have possession of said premises, the same are deteriorating continually and the value thereof is depreciating; that by reason of the foregoing and due to a material change in the real estate market since the time that the said trust deed was executed, the present market value of said premises is considerably less than the value thereof than at the time said trust deed was executed. * * "

This statement is nothing but a conclusion. No facts are stated that would enable the court to determine that the premises are in need of repair and that the security is lessened by the negligence of the defendant. While the rents, issues and profits are derived from the premises and are pledged as additional security for the payment of the indebtedness, still such a provision in the trust deed does not make it mandatory upon the court to appoint a receiver in a foreclosure proceeding unless it clearly appears that the property is scant security for the indebtedness. This court in Frank v. Siegel, 263 Ill. App. 316, upon a somewhat similar provision contained in the trust deed, said:

"In this court we have repeatedly held that the pledge of the rents in the trust deed is not conclusive upon the chancellor upon the application for the appointment of a receiver; that while it is entitled to weight, all the equities of the case should be considered and that it would be contrary to the nature of a court of equity to enforce the exact letter of the contract of mortgage regardless of the necessities or equities involved." Citing cases.

It has been called to our attention that the payment of taxes for the years 1928, 1929, and 1930, are in default and that this is an allegation of fact that would justify the court in appointing a receiver for the premises. Upon an examination of the record, however, this court finds that objections have been filed in the County Court of Cook County and that objections are still pending to the entry of judgment for the default in the payment of taxes, and that under the circumstances this allegation of fact is not such as would justify the appointment of a receiver.

It might be well to have in mind that suggestions based upon facts in the briefs filed in this case that are not supported by the record will not be considered by this court; that such suggestions are of no particular aid and only interfere with the work of this court and require a close examination of the record in order to determine what facts are not properly before us. The order appointing a receiver will be reversed.

ORDER REVERSED.

WILSON, P.J. AND HALL, J. CONCUR.

It has been called to our attention that the payment of taxes for the years 1928, 1929, and 1930, are in default and that this is an allegation of fact that would justify the court in appointing a receiver for the business. Upon an examination of the record, however, this court finds that objections have been filed in the County Court of Cook County and that objections are still pending to the entry of judgment for the default in the payment of taxes, and that under the circumstances this allegation of fact is not such as would justify the appointment of a receiver. It might be well to have in mind that suggestions based upon facts in the record filed in this case that are not supported by the record will not be considered by this court; that such suggestions are of no particular aid and only interfere with the work of this court and require a close examination of the record in order to determine what facts are not properly before us. The order appointing a receiver will be reversed.

ORDER REVERSED.

WILSON, P. J. AND HALL, J. CONCUR.

8546

17

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the second day of May in
the year of our Lord one thousand nine hundred and thirty-three,
within and for the Second District of the State of Illinois:

Present-- The Hon. FRED G. WOLFE, Presiding Justice.

Hon. JAMES S. BALDWIN, Justice.

Hon. THOMAS M. JETT, Justice.

JUSTUS L. JOHNSON, Clerk.

E. J. WELTER, Sheriff.

270 I.A. 6374

BE IT REMEMBERED, that afterwards, to-wit: On

MAY 3 1933 the opinion of the Court was filed in the

Clerk's office of said Court, in the words and figures
following, to-wit:

In The
APPELLATE COURT OF ILLINOIS
Second District
October Term, A.D. 1932.

Emma Nicholson,
(Complainant) Appellee,

vs

G.W. Scott, Harriet Scott
and D.A. Bennett,
Defendants,

Russell F. Hunter, Intervening
Petitioner,
(Defendant) Appellant.

}
Appeal from the
Circuit Court of
LaSalle County.

Baldwin, J.

On February 18th, 1930 Emma Nicholson, the Complainant, (appellee) filed her creditor's bill in the Circuit Court of LaSalle County making G. W. Scott, Harriet Scott and D. A. Bennett parties defendant.

In her bill of complaint she alleged that G. W. Scott had desired to purchase 3.44 acres of land in LaSalle County and for such purpose she had loaned to him the sum of \$500.00 receiving as evidence thereof his judgment note due September 26th, 1927 and thereafter such note was renewed for a period of one year.

TO THE
MEMBERS OF THE BOARD OF DIRECTORS
OF THE
UNITED STATES DEPARTMENT OF JUSTICE
WASHINGTON, D. C. 20535

Dear Sirs:

I am writing to you in regard to the

above captioned matter.

Enclosed for you are two copies of a letterhead memorandum (LHM) dated and captioned as above. The LHM is being furnished to you for your information and for your use in the performance of your duties. The LHM is being furnished to you in accordance with the provisions of the Freedom of Information Act, 5 U.S.C. 552, which requires that all records of the Department of Justice be made available to the public, except where the release of such records is prohibited by law.

Sincerely,
J. Edgar Hoover

On February 10, 1964, the above captioned LHM was received from the Federal Bureau of Investigation (FBI) in the District of Columbia. The LHM is being furnished to you for your information and for your use in the performance of your duties. The LHM is being furnished to you in accordance with the provisions of the Freedom of Information Act, 5 U.S.C. 552, which requires that all records of the Department of Justice be made available to the public, except where the release of such records is prohibited by law.

In the LHM of the FBI, it is stated that the LHM is being furnished to you for your information and for your use in the performance of your duties. The LHM is being furnished to you in accordance with the provisions of the Freedom of Information Act, 5 U.S.C. 552, which requires that all records of the Department of Justice be made available to the public, except where the release of such records is prohibited by law.

Very truly yours,
J. Edgar Hoover

On October 14th, 1929 she obtained a judgment upon such note against the said G. W. Scott. An execution issued on the said judgment was returned by the sheriff endorsed "No property found."

It is further recited that on May 25, 1929 G. W. Scott made a conveyance of the property to H. A. Bennett and on the same day the said Bennett reconveyed the premises to Harriet Scott, the wife of the said G. W. Scott. Both of said conveyances were recorded on June 5, 1929 and it is alleged that the conveyances were in fraud of her rights as a creditor of G. W. Scott.

It was further alleged that the complainant had, on March 18, 1929 entered her breach of promise suit against the said G. W. Scott and a judgment recovered therein on February 11th, 1930 for the sum of \$525.00 and costs, but that such judgment was never paid. It was also alleged that on February 17th, 1930 levy had been made upon the premises by the sheriff and a certificate thereof filed for record in LeBalle County and the bill prayed for the setting aside of the conveyances so as to make possible a levy and sale of the premises to satisfy the two judgments rendered. The defendants were served with summons and Harriet Scott filed her answer in said proceeding.

On July 9th, 1930 Russell P. Hunter, the appellant herein, was by order of court granted leave to file an intervening petition in this cause within ten days, which intervening petition and answer were filed July 19, 1930. By the intervening petition the appellee alleged that acting for the Hunter-Dunsmuir Lumber Company, of which firm he was a member, he had, on June 19th, 1929, entered into a contract with Harriet Scott, one of the defendants in the original bill, for the furnishing of certain lumber, cement and other building materials for the con-

On August 22, 1951, the following information was received from the Bureau of the Census, Washington, D. C.:

[illegible][illegible]

struction of a gasoline station and dwelling house to be located on said tract of land and that said Harriet Scott had promised and agreed to pay for the said building materials the sum of \$2,677.88 but that she had been unable to do so; that several sub-contractors had claims against her and had threatened to institute foreclosure proceedings to recover the moneys due them.

He further alleged that the said Harriet Scott agreed to convey the said premises to him by a good and sufficient warranty deed if he would pay the valid claims of such sub-contractors and material men and averred that in pursuance of such agreement he did pay such claims to the extent of \$2,822.14 and that in consideration of the payment of these claims and of the claim of his own firm the said Harriet Scott and her husband did, on November 20th, 1929, execute and deliver to him a warranty deed conveying the said premises.

That thereafter he entered into a written contract with the said Harriet Scott whereby he agreed to re-convey the premises to her when she had fully paid and discharged her indebtedness in the sum of \$5,500.00.

It was further alleged that the deed was recorded on March 17th, 1930 and that he had no information at any time of the supposed claim of the said Emma Nicholson or of the character of conveyances under which the said Harriet Scott derived her title but that he had acted in good faith, relying upon her apparent ownership of title to said premises.

Rule was entered requiring all defendants to plead to this petition. The appellee, Emma Nicholson, and the defendant, Harriet Scott, filed general demurrers to the intervening petition, which on March 23rd, 1932, were sustained. Russell

F. Hunter thereupon elected to abide by his intervening petition and the court entered an order dismissing the same at the cost of the appellant. It is from this order dismissing such petition that this appeal is prosecuted.

The appellee, Emma Nicholson, filed herein her motion to dismiss the appeal because she contends that the order dismissing such intervening petition was not a final order and therefore that no appeal could be taken therefrom. This motion to dismiss the appeal is taken with the case. The order dismissing the bill of complaint of the appellant was a final order as to such appellant for any rights he might have in the proceeding and as such was an appealable order, therefore, the petition to dismiss this appeal is overruled.

The only other question to be determined upon this appeal is the right of the appellant to intervene and the correctness of the order of the court in sustaining the demurrers to such intervening petition.

In *Gaumer vs Snedaker* 330 Ill. 511 page 515 the court said: "All persons who have a substantial, legal or beneficial interest in the subject matter of the litigation which will be materially affected by the decree are necessary parties to a bill in equity. Whenever a party has been omitted whose presence is so indispensable to a decision of the case upon its merits that a final decree cannot be made without materially affecting his interests, the court should not proceed to a decision of the case upon the merits. The objection may be made by a party at the hearing or on appeal or error, and the court will upon its own motion take notice of the omission and require the omitted party to be made a party to the litigation even though no objection is made by any party litigant." (*Knopf vs Chicago Real Estate Board*, 173 Ill. 106; *Abernathie vs Rich*

229 Ill. 412; McNeenan vs Yenter, 301 Ill. 506; Webster vs Jackson, 304 Ill. 560; Mortimore vs Bashore, 317 Ill. 535.)

In Miller vs Clark 301 Ill. 273 page 281 the court in passing upon a similar question quoted with approval from the case of March vs Green, 70 Ill. 385 page 387 as follows: "As we understand the modern practice, any person feeling that he has an interest in the litigation may apply to the court and be permitted to intervene and become a party and have his rights passed upon on the hearing, and the court will permit him to become such party on a proper showing. He would, of course, not be permitted to intermeddle when he had no substantial interest in the subject matter of the suit." This same doctrine has been approved in the cases of Shammahan vs Stevens 130 Ill. 428 and Wightman vs Kvanston Yarnan Co. 217 Ill. 371.

There are many other authorities to the same effect but it would serve no useful purpose to review the subject further.

We have examined the intervening petition and are of the opinion that the allegations therein set forth state a cause of action and that the intervening petitioner is a necessary party to such proceeding. The court therefore erred in sustaining the demurrers to such intervening petition and dismissing same.

The judgment of the Circuit Court of LaSalle County is reversed and the cause remanded with directions to overrule the demurrers to such intervening petition.

REVERSED AND REMANDED WITH DIRECTIONS.

STATE OF ILLINOIS,

SECOND DISTRICT

} ss.

I, JUSTUS L. JOHNSON, Clerk of the Appellate Court, in and for said Second District of the State of Illinois, and the keeper of the Records and Seal thereof, do hereby certify that the foregoing is a true copy of the opinion of the said Appellate Court in the above entitled cause, of record in my office.

In Testimony Whereof, I hereunto set my hand and affix the seal of said Appellate Court, at Ottawa, this _____ day of _____ in the year of our Lord one thousand nine hundred and thirty-_____

Clerk of the Appellate Court

8570

17

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the second day of May in
the year of our Lord one thousand nine hundred and thirty-three,
within and for the Second District of the State of Illinois:

Present-- The Hon. FRED G. WOLFE, Presiding Justice.

Hon. JAMES S. BALDWIN, Justice.

Hon. THOMAS M. JETT, Justice.

JUSTUS L. JOHNSON, Clerk.

E. J. WELTER, Sheriff.

270 I.A. 638¹

BE IT REMEMBERED, that afterwards, to-wit: On

MAY 3 1933 the opinion of the Court was filed in the

Clerk's office of said Court, in the words and figures
following, to-wit:

In The
Appellate Court of Illinois
Second District
February Term, A. D. 1935.

Peoples National Bank,
a corporation

Appellant

vs

Ellen Payne, Elizabeth
Payne, Lizzid Payne, et al
Appellees.

Appeal from the
Circuit Court of
Warren County, Illinois.

Baldwin, J.

This is an appeal from a decree of the Circuit Court
of Warren County dismissing the bill of complaint of the
appellant, (^{complainant} defendant in trial court) for want of equity.

The facts are substantially that One William Payne,
husband of Ellen Payne, in his life time, was the owner of
certain lands.

On December 5th, 1919 the Little York Grain Company
recovered a judgment against him in the Circuit Court of
Warren County for \$2,499.02.

On October 18th, 1920 Clay, Robinson & Company also
obtained a judgment against the said William Payne in the
same court for the sum of \$12,801.05.

IN RE

JOHN EDGAR HOOVER

Defendant

Case No. 100-100000

JOHN EDGAR HOOVER
Defendant
Case No. 100-100000

JOHN EDGAR HOOVER
Defendant
Case No. 100-100000

JOHN EDGAR HOOVER

JOHN EDGAR HOOVER
Defendant
Case No. 100-100000

JOHN EDGAR HOOVER
Defendant
Case No. 100-100000

JOHN EDGAR HOOVER
Defendant
Case No. 100-100000

Afterward, Ellen Payne, wife of said William Payne, made some adjustment with such judgment creditors and took assignments of their judgment to herself.

Thereafter William Payne died, intestate, and one J. A. Tubbs was appointed administrator of his said estate.

On January 12th, 1934 Ellen Payne, widow of William Payne, assigned both of said judgments above described to Elizabeth Payne, her daughter, which, according to the testimony herein, was in consideration of services rendered in accordance with an agreement existing between the said Ellen Payne and her daughter, Elizabeth Payne. Notice of such assignment was filed in the office of the County Clerk of Warren County.

On October 15th, 1934 the said Elizabeth Payne assigned the said judgments to her aunt, Lizzie Payne, and notice of such assignment was recorded in the office of the County Clerk of Warren County, Illinois, on October 15th, 1934. Such assignment from the testimony herein was for a consideration of \$4,000.00.

On October 27th, 1934 the complainant herein filed its bill of complaint in the Circuit Court of Warren County, Illinois against Ellen Payne and Elizabeth Payne, alleging that on July 7th, 1934 it had procured a judgment against Ellen Payne in the sum of \$5,553.00 and costs. It appears from the record that nothing further was done about the suit until on or about May 22nd, 1931 when an amendment was made to the original bill of complaint making Lizzie Payne a party to the proceeding and summons was thereafter served on her on August 4th, 1931. Lizzie Payne filed her answer to the amended bill of complaint and thereafter the cause was referred to the Master in Chancery of said

The undersigned, being the undersigned, do hereby certify that the within and foregoing is a true and correct copy of the original of the same, as the same appears from the records of the County of ... State of ...

In testimony whereof, I have hereunto set my hand and the seal of the County of ... at the City of ... this ... day of ... 19...

County Clerk

court for proof and conclusions. The Master heard the evidence and filed his report in the court recommending that the cause be dismissed for want of equity.

Objections filed to said report and by agreement were ordered to stand in court as exceptions. The court overruled such exceptions and sustained the report of the master and dismissed the bill of complaint for want of equity at the cost of the complainant.

It is an elementary rule of law that to be entitled to the relief asked the complainant has the burden of proving the allegations in his bill of complaint.

It is also the well settled law of this State that the burden of proving fraud rests upon the person asserting the fraud. As was said in the case of *Kiska vs VanKat* 341 Ill. 358 P. 362, "Fraud is never presumed but must be proved by clear and convincing evidence. A mere suspicion of fraud is not sufficient but if it exists it must be satisfactorily shown. The evidence must be clear and cogent and must leave the mind well satisfied that the allegations of fraud and misrepresentations are true." The court used the identical language in the cases of *Garrett vs Garrett* 343 Ill. 577, P. 580; *Jaworski vs Sujewicz* 334 Ill. 19; *Schiavone vs Ashton* 332 Ill. 484.

But it is urged by the appellant herein that because the parties are members of the same family or related, that an inference of fraud should be raised. We know of no rule of law which presumes dealings between persons related to each other or who are members of the same family to be fraudulent. No such presumption arises but as herein set forth allegations of fraud must be proven clearly and conclusively

of course his only possession was a few old and broken old tools and

...to the ...

with character of his family life as well as his

Influence of the size of the sample on the results of the analysis

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of business will be paid for by other means, so that it

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6. 1995年12月15日，在《人民日报》发表署名文章《论中国加入世界贸易组织》，指出中国加入世界贸易组织是中国的重大决策，也是世界贸易组织的一件大事。

and the other two are the same as in the first case.

IN REPLY TO THE ABOVE MENTIONED LETTER OF THE 10TH INSTANT, THE FOLLOWING INFORMATION IS FURNISHED:

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what we must be especially self-disciplined. Our best self-

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THE JOURNAL OF THE AMERICAN MEDICAL ASSOCIATION
PUBLISHED WEEKLY
535 N. Dearborn Ave. Chicago 10, Ill.
Subscription price: Five Dollars Per Annum in Advance
Single Copies: Fifteen Cents
Entered as Second-Class Matter, May 26, 1917
Postpaid at Chicago, Ill., and at additional mailing offices
Postage paid at Chicago, Ill., and at additional mailing offices
Acceptance for mailing at special rate of postage provided for in
Act of October 3, 1917, authorized on July 10, 1918
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Printed at the American Medical Association, 535 N. Dearborn Ave., Chicago 10, Ill.

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22. *Journal of the American Medical Association*, 1990; 263: 1001-1002.

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1. The first group of respondents (Group 1) consisted of 100 individuals who were randomly selected from the population of 1,000 individuals. This group was used to estimate the population mean and standard deviation.

and this is true regardless of the relationship of the parties. In *Garrett vs Garrett*, supra, page 580, the court held that "the relationship of the parties is merely a circumstance which may excite suspicion, but it will not, alone and of itself, amount to proof of fraud." To the same effect are the cases of *Luthy & Co. vs Paradis* 299 Ill. 380; *Ayers Nat. Bank vs Barber* 287 Ill. 182; *American Hoist and Derrick Co. vs Hall* 308 Ill. 587.

Lizzie Payne, the present owner of such judgments, acquired title thereto for a valuable consideration, according to the undisputed testimony herein, and notice of her ownership was recorded prior to the filing of the suit of the complainant herein and yet she was not made a party to the suit until nearly seven years after the original suit had been filed. Her title to these judgments had been derived through her niece. The niece obtained title through her mother, in payment of moneys due to her for services rendered to the mother in accordance with the agreement existing between them and which had existed for some years past. Each and every assignment was made a matter of public record available to any person interested. It is apparent that the assignment of Ellen Payne to Elizabeth Payne was made several months before the complainant procured the judgment described in its bill of complaint.

Such assignments are not real estate, yet if they could be so regarded the judgment of the complainant would not be a lien upon them or either of them. So far as the evidence discloses herein no execution was issued upon the judgment of the complainant. It is provided by Statute of this State, Chapter 77, Section 1 of Cahill Illinois Revised Statute 1931 as follows: "A judgment of a court of record shall be a lien on the real

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Subject: Government of India

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to search for the truth and to find out what is really going on.

100-443887-100

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These figures are based upon the following assumptions:

10-11-68, 12-11-68, 1-11-69, 2-11-69, 3-11-69, 4-11-69, 5-11-69, 6-11-69, 7-11-69, 8-11-69, 9-11-69, 10-11-69, 11-11-69, 12-11-69, 1-11-70, 2-11-70, 3-11-70, 4-11-70, 5-11-70, 6-11-70, 7-11-70, 8-11-70, 9-11-70, 10-11-70, 11-11-70, 12-11-70, 1-11-71, 2-11-71, 3-11-71, 4-11-71, 5-11-71, 6-11-71, 7-11-71, 8-11-71, 9-11-71, 10-11-71, 11-11-71, 12-11-71, 1-11-72, 2-11-72, 3-11-72, 4-11-72, 5-11-72, 6-11-72, 7-11-72, 8-11-72, 9-11-72, 10-11-72, 11-11-72, 12-11-72, 1-11-73, 2-11-73, 3-11-73, 4-11-73, 5-11-73, 6-11-73, 7-11-73, 8-11-73, 9-11-73, 10-11-73, 11-11-73, 12-11-73, 1-11-74, 2-11-74, 3-11-74, 4-11-74, 5-11-74, 6-11-74, 7-11-74, 8-11-74, 9-11-74, 10-11-74, 11-11-74, 12-11-74, 1-11-75, 2-11-75, 3-11-75, 4-11-75, 5-11-75, 6-11-75, 7-11-75, 8-11-75, 9-11-75, 10-11-75, 11-11-75, 12-11-75, 1-11-76, 2-11-76, 3-11-76, 4-11-76, 5-11-76, 6-11-76, 7-11-76, 8-11-76, 9-11-76, 10-11-76, 11-11-76, 12-11-76, 1-11-77, 2-11-77, 3-11-77, 4-11-77, 5-11-77, 6-11-77, 7-11-77, 8-11-77, 9-11-77, 10-11-77, 11-11-77, 12-11-77, 1-11-78, 2-11-78, 3-11-78, 4-11-78, 5-11-78, 6-11-78, 7-11-78, 8-11-78, 9-11-78, 10-11-78, 11-11-78, 12-11-78, 1-11-79, 2-11-79, 3-11-79, 4-11-79, 5-11-79, 6-11-79, 7-11-79, 8-11-79, 9-11-79, 10-11-79, 11-11-79, 12-11-79, 1-11-80, 2-11-80, 3-11-80, 4-11-80, 5-11-80, 6-11-80, 7-11-80, 8-11-80, 9-11-80, 10-11-80, 11-11-80, 12-11-80, 1-11-81, 2-11-81, 3-11-81, 4-11-81, 5-11-81, 6-11-81, 7-11-81, 8-11-81, 9-11-81, 10-11-81, 11-11-81, 12-11-81, 1-11-82, 2-11-82, 3-11-82, 4-11-82, 5-11-82, 6-11-82, 7-11-82, 8-11-82, 9-11-82, 10-11-82, 11-11-82, 12-11-82, 1-11-83, 2-11-83, 3-11-83, 4-11-83, 5-11-83, 6-11-83, 7-11-83, 8-11-83, 9-11-83, 10-11-83, 11-11-83, 12-11-83, 1-11-84, 2-11-84, 3-11-84, 4-11-84, 5-11-84, 6-11-84, 7-11-84, 8-11-84, 9-11-84, 10-11-84, 11-11-84, 12-11-84, 1-11-85, 2-11-85, 3-11-85, 4-11-85, 5-11-85, 6-11-85, 7-11-85, 8-11-85, 9-11-85, 10-11-85, 11-11-85, 12-11-85, 1-11-86, 2-11-86, 3-11-86, 4-11-86, 5-11-86, 6-11-86, 7-11-86, 8-11-86, 9-11-86, 10-11-86, 11-11-86, 12-11-86, 1-11-87, 2-11-87, 3-11-87, 4-11-87, 5-11-87, 6-11-87, 7-11-87, 8-11-87, 9-11-87, 10-11-87, 11-11-87, 12-11-87, 1-11-88, 2-11-88, 3-11-88, 4-11-88, 5-11-88, 6-11-88, 7-11-88, 8-11-88, 9-11-88, 10-11-88, 11-11-88, 12-11-88, 1-11-89, 2-11-89, 3-11-89, 4-11-89, 5-11-89, 6-11-89, 7-11-89, 8-11-89, 9-11-89, 10-11-89, 11-11-89, 12-11-89, 1-11-90, 2-11-90, 3-11-90, 4-11-90, 5-11-90, 6-11-90, 7-11-90, 8-11-90, 9-11-90, 10-11-90, 11-11-90, 12-11-90, 1-11-91, 2-11-91, 3-11-91, 4-11-91, 5-11-91, 6-11-91, 7-11-91, 8-11-91, 9-11-91, 10-11-91, 11-11-91, 12-11-91, 1-11-92, 2-11-92, 3-11-92, 4-11-92, 5-11-92, 6-11-92, 7-11-92, 8-11-92, 9-11-92, 10-11-92, 11-11-92, 12-11-92, 1-11-93, 2-11-93, 3-11-93, 4-11-93, 5-11-93, 6-11-93, 7-11-93, 8-11-93, 9-11-93, 10-11-93, 11-11-93, 12-11-93, 1-11-94, 2-11-94, 3-11-94, 4-11-94, 5-11-94, 6-11-94, 7-11-94, 8-11-94, 9-11-94, 10-11-94, 11-11-94, 12-11-94, 1-11-95, 2-11-95, 3-11-95, 4-11-95, 5-11-95, 6-11-95, 7-11-95, 8-11-95, 9-11-95, 10-11-95, 11-11-95, 12-11-95, 1-11-96, 2-11-96, 3-11-96, 4-11-96, 5-11-96, 6-11-96, 7-11-96, 8-11-96, 9-11-96, 10-11-96, 11-11-96, 12-11-96, 1-11-97, 2-11-97, 3-11-97, 4-11-97, 5-11-97, 6-11-97, 7-11-97, 8-11-97, 9-11-97, 10-11-97, 11-11-97, 12-11-97, 1-11-98, 2-11-98, 3-11-98, 4-11-98, 5-11-98, 6-11-98, 7-11-98, 8-11-98, 9-11-98, 10-11-98, 11-11-98, 12-11-98, 1-11-99, 2-11-99, 3-11-99, 4-11-99, 5-11-99, 6-11-99, 7-11-99, 8-11-99, 9-11-99, 10-11-99, 11-11-99, 12-11-99, 1-11-00, 2-11-00, 3-11-00, 4-11-00, 5-11-00, 6-11-00, 7-11-00, 8-11-00, 9-11-00, 10-11-00, 11-11-00, 12-11-00, 1-11-01, 2-11-01, 3-11-01, 4-11-01, 5-11-01, 6-11-01, 7-11-01, 8-11-01, 9-11-01, 10-11-01, 11-11-01, 12-11-01, 1-11-02, 2-11-02, 3-11-02, 4-11-02, 5-11-02, 6-11-02, 7-11-02, 8-11-02, 9-11-02, 10-11-02, 11-11-02, 12-11-02, 1-11-03, 2-11-03, 3-11-03, 4-11-03, 5-11-03, 6-11-03, 7-11-03, 8-11-03, 9-11-03, 10-11-03, 11-11-03, 12-11-03, 1-11-04, 2-11-04, 3-11-04, 4-11-04, 5-11-04, 6-11-04, 7-11-04, 8-11-04, 9-11-04, 10-11-04, 11-11-04, 12-11-04, 1-11-05, 2-11-05, 3-11-05, 4-11-05, 5-11-05, 6-11-05, 7-11-05, 8-11-05, 9-11-0

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and reported that the level of the water in the reservoir

1. *Staphylococcus aureus* (100%)

1923 18 1924 19 1925 20 1926 21 1927 22 1928 23 1929 24 1930 25 1931 26 1932 27 1933 28 1934 29 1935 30 1936 31 1937 32 1938 33 1939 34 1940 35 1941 36 1942 37 1943 38 1944 39 1945 40 1946 41 1947 42 1948 43 1949 44 1950 45 1951 46 1952 47 1953 48 1954 49 1955 50 1956 51 1957 52 1958 53 1959 54 1960 55 1961 56 1962 57 1963 58 1964 59 1965 60 1966 61 1967 62 1968 63 1969 64 1970 65 1971 66 1972 67 1973 68 1974 69 1975 70 1976 71 1977 72 1978 73 1979 74 1980 75 1981 76 1982 77 1983 78 1984 79 1985 80 1986 81 1987 82 1988 83 1989 84 1990 85 1991 86 1992 87 1993 88 1994 89 1995 90 1996 91 1997 92 1998 93 1999 94 2000 95 2001 96 2002 97 2003 98 2004 99 2005 100 2006 101 2007 102 2008 103 2009 104 2010 105 2011 106 2012 107 2013 108 2014 109 2015 110 2016 111 2017 112 2018 113 2019 114 2020 115 2021 116 2022 117 2023 118 2024 119 2025 120 2026 121 2027 122 2028 123 2029 124 2030 125 2031 126 2032 127 2033 128 2034 129 2035 130 2036 131 2037 132 2038 133 2039 134 2040 135 2041 136 2042 137 2043 138 2044 139 2045 140 2046 141 2047 142 2048 143 2049 144 2050 145 2051 146 2052 147 2053 148 2054 149 2055 150 2056 151 2057 152 2058 153 2059 154 2060 155 2061 156 2062 157 2063 158 2064 159 2065 160 2066 161 2067 162 2068 163 2069 164 2070 165 2071 166 2072 167 2073 168 2074 169 2075 170 2076 171 2077 172 2078 173 2079 174 2080 175 2081 176 2082 177 2083 178 2084 179 2085 180 2086 181 2087 182 2088 183 2089 184 2090 185 2091 186 2092 187 2093 188 2094 189 2095 190 2096 191 2097 192 2098 193 2099 194 2100 195 2101 196 2102 197 2103 198 2104 199 2105 200 2106 201 2107 202 2108 203 2109 204 2110 205 2111 206 2112 207 2113 208 2114 209 2115 210 2116 211 2117 212 2118 213 2119 214 2120 215 2121 216 2122 217 2123 218 2124 219 2125 220 2126 221 2127 222 2128 223 2129 224 2130 225 2131 226 2132 227 2133 228 2134 229 2135 230 2136 231 2137 232 2138 233 2139 234 2140 235 2141 236 2142 237 2143 238 2144 239 2145 240 2146 241 2147 242 2148 243 2149 244 2150 245 2151 246 2152 247 2153 248 2154 249 2155 250 2156 251 2157 252 2158 253 2159 254 2160 255 2161 256 2162 257 2163 258 2164 259 2165 260 2166 261 2167 262 2168 263 2169 264 2170 265 2171 266 2172 267 2173 268 2174 269 2175 270 2176 271 2177 272 2178 273 2179 274 2180 275 2181 276 2182 277 2183 278 2184 279 2185 280 2186 281 2187 282 2188 283 2189 284 2190 285 2191 286 2192 287 2193 288 2194 289 2195 290 2196 291 2197 292 2198 293 2199 294 2200 295 2201 296 2202 297 2203 298 2204 299 2205 300 2206 301 2207 302 2208 303 2209 304 2210 305 2211 306 2212 307 2213 308 2214 309 2215 310 2216 311 2217 312 2218 313 2219 314 2220 315 2221 316 2222 317 2223 318 2224 319 2225 320 2226 321 2227 322 2228 323 2229 324 2230 325 2231 326 2232 327 2233 328 2234 329 2235 330 2236 331 2237 332 2238 333 2239 334 2240 335 2241 336 2242 337 2243 338 2244 339 2245 340 2246 341 2247 342 2248 343 2249 344 2250 345 2251 346 2252 347 2253 348 2254 349 2255 350 2256 351 2257 352 2258 353 2259 354 2260 355 2261 356 2262 357 2263 358 2264 359 2265 360 2266 361 2267 362 2268 363 2269 364 2270 365 2271 366 2272 367 2273 368 2274 369 2275 370 2276 371 2277 372 2278 373 2279 374 2280 375 2281 376 2282 377 2283 378 2284 379 2285 380 2286 381 2287 382 2288 383 2289 384 2290 385 2291 386 2292 387 2293 388 2294 389 2295 390 2296 391 2297 392 2298 393 2299 394 2300 395 2301 396 2302 397 2303 398 2304 399 2305 400 2306 401 2307 402 2308 403 2309 404 2310 405 2311 406 2312 407 2313 408 2314 409 2315 410 2316 411 2317 412 2318 413 2319 414 2320 415 2321 416 2322 417 2323 418 2324 419 2325 420 2326 421 2327 422 2328 423 2329 424 2330 425 2331 426 2332 427 2333 428 2334 429 2335 430 2336 431 2337 432 2338 433 2339 434 2340 435 2341 436 2342 437 2343 438 2344 439 2345 440 2346 441 2347 442 2348 443 2349 444 2350 445 2351 446 2352 447 2353 448 2354 449 2355 450 2356 451 2357 452 2358 453 2359 454 2360 455 2361 456 2362 457 2363 458 2364 459 2365 460 2366 461 2367 462 2368 463 2369 464 2370 465 2371 466 2372 467 2373 468 2374 469 2375 470 2376 471 2377 472 2378 473 2379 474 2380 475 2381 476 2382 477 2383 478 2384 479 2385 480 2386 481

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estate of the person against whom it is obtained situated within the County for which the court is held, from the time the same is rendered or revived for the period of seven years and no longer. *** When execution is not issued on a judgment within one year from the time the same becomes a lien, it shall thereafter cease to be a lien, but execution must issue upon such judgments at any time within seven years."

It is also urged by the complainant that the Master reported only his conclusion as to law and fact relative to the merits of the case against Lizzie Payne and that his finding was to the effect that such judgment had become dormant as against Ellen Payne and therefore could not be enforced as against Lizzie Payne. He also found that there was no fraud proven as against Lizzie Payne. We see no error in this report.

There are some other questions raised by both parties to this proceeding but in view of our decision we deem it unnecessary to discuss them.

The judgment of the Circuit Court of Warren County is affirmed.

AFFIRMED.

STATE OF ILLINOIS,

SECOND DISTRICT

} ss.

I, JUSTUS L. JOHNSON, Clerk of the Appellate Court, in and for said Second District of the State of Illinois, and the keeper of the Records and Seal thereof, do hereby certify that the foregoing is a true copy of the opinion of the said Appellate Court in the above entitled cause, of record in my office.

In Testimony Whereof, I hereunto set my hand and affix the seal of said Appellate Court, at Ottawa, this_____day of _____in the year of our Lord one thousand nine hundred and thirty-_____

Clerk of the Appellate Court

637
AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the second day of May in
the year of our Lord one thousand nine hundred and thirty-three,
within and for the Second District of the State of Illinois:

Present-- The Hon. FRED G. WOLFE, Presiding Justice.

Hon. JAMES S. BALDWIN, Justice.

Hon. THOMAS M. JETT, Justice.

JUSTUS L. JOHNSON, Clerk.

E. J. WELTER, Sheriff.

~~270 I.A. 63~~

270 I.A. 638²

BE IT REMEMBERED, that afterwards, to-wit: On

MAY 8 1933 the opinion of the Court was filed in the
Clerk's office of said Court, in the words and figures
following, to-wit:

In The
Appellate Court of Illinois
Second District
February Term, A. D. 1933.

- - - - -

People of the State of Illinois,
ex rel. Oscar Nelson, Auditor of
Public Accounts of said State,
Complainant,

vs

Lombard State Bank, et al,
Defendants.

- - -

Appeal of
Village of Lombard,
(Petitioner) Appellant,

vs

Thomas G. Hull, Receiver of
Lombard State Bank,
Appellee.

}
Appeal from the

Circuit Court of

Du Page County.

- - - - -

Baldwin, J.

- - - - -

The Lombard State Bank was closed on or about December 19th, 1931 by the auditor of the State of Illinois, and thereafter a receiver, appointed by such auditor, took possession of the said bank.

Subsequently Oscar Nelson, then auditor of the State of Illinois, filed his bill of complaint in the Circuit Court of Du Page County.

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Thereafter the Village of Lombard filed its intervening petition in such proceeding in and by which it was recited that such village was an Illinois corporation and that it had collected large sums under its taxing powers on behalf of certain bond holders under the local improvement statute of the State of Illinois; that one E. A. Logan was the village treasurer and as such treasurer was custodian of all ^{of} the funds belonging to the village; that such treasurer had deposited the said moneys in the Lombard State Bank, which had, at the time of the filing of the intervening petition, been placed in charge of a receiver under appointment by the Auditor of the State of Illinois.

It was further alleged that E. A. Logan, treasurer of the said village, had wrongfully deposited such moneys in the Lombard State Bank and that the bank had knowingly and willfully received such deposit and failed to give a bond therefor and that thereby the Lombard State Bank was a trustee of said funds for and on behalf of the Village of Lombard and requested that its claim of \$37,136.63 be allowed as a preferred claim against the said bank.

It appears that the sum of \$37,136.63 was evidenced in part by a certificate of deposit and in part by a general checking account in the said bank, all in the name of E. A. Logan, Treasurer of the Village of Lombard, Illinois, but that such sum was the total amount of moneys on deposit in the said bank at the time it closed its doors.

The respective parties to such suit entered into a stipulation reciting the facts substantially as above set forth and the case was heard by the court upon such stipulation. The court refused to allow the said claim as a preference but did allow the claim of the intervening peti-

...the ... of ...

It was further alleged that the defendant, respondent, at the said village, had unlawfully converted and wrongfully

The following is a list of the names of the persons who have been appointed to the various positions in the Department of the Interior, under the act of March 3, 1879, for the term of four years, to-wit:

tioner as a general claim against such bank and a decree was accordingly entered disallowing the preference but allowing the claim as a general claim.

The Village of Lombard presented this appeal from such decree.

In its brief and argument counsel of the Village of Lombard has commented considerably upon the statute of the State to the effect that the funds should only be paid out on the warrant drawn by a village officer. We do not believe this statute has the slightest effect upon the transaction in this case. The village treasurer is the custodian of the village moneys and it was his duty to keep the money safely and pay it out upon appropriate warrants or orders. Common prudence would dictate the keeping of such moneys in a depository rather than in his personal possession, but the placing of such moneys in a depository is not a paying out of the funds within the meaning of the statute. The deposit of such moneys in this bank was merely for his convenience and its possession of such moneys is exactly the same as its possession of moneys of any other depositor.

Comment is made upon the liability of the village treasurer but we do not regard this subject as an issue in this case. The sole and only question to be determined herein is whether or not moneys deposited by the village treasurer to his credit as such treasurer in the Lombard State Bank constitutes a trust fund so that the treasurer or the village might be entitled to the allowance of its claim as a preference.

There can be no doubt but that it was the business of the Lombard State Bank in its conduct of a banking business to receive deposits of money from its various patrons and

to place the same to the credit upon its records of the various depositors, and in accepting deposits from the village treasurer the bank violated no law whatever so far as the record in this case shows. The mere fact that the moneys so deposited by such treasurer were the property of the Village of Lombard to his credit as such treasurer did not create the relation of trustee and cestui que trust but created merely the relation of debtor and creditor, that is to say, the village treasurer became a creditor of the bank, and the bank became a debtor of the village treasurer, to the extent of the funds so deposited with it, but this relation exacted nothing more or less than the liability of the bank to pay out the moneys so deposited by such village treasurer in the same manner and to the same extent and upon the same terms as that of any other depositor.

In Woodhouse vs Grandall 197 Ill. 104 page 109 the court in passing upon a similar question said: "In the case of a general deposit with a bank to the credit of the depositor, the relation created is not that of principal and agent or of trustee and cestui que trust, but is merely that of debtor and creditor, and such deposits belong to the bank and become a part of its general funds and there is nothing but a liability as a debtor to repay according to the customs and usages of the business."

In People, etc. vs Seward State Bank 268 Ill. App. 32 a very similar question was before the court. We held that the deposits of moneys by a treasurer (school) in his official capacity are subject to the same rules of law as relates to other depositors and upon the insolvency of the bank with which such deposits are made, he is not entitled to a preference, because of such official position, and such rule of law is appli-

[illegible]

cable to this case. The mere fact that the treasurer of the Village may be personally liable, if such is the case, does not alter the character of a general deposit in a bank in any manner whatever.

It is asserted that the said bank did not give any bond to the village and that the village did not adopt an ordinance designating any particular depository of the moneys of the said village. Conceding this to be true, such fact is, in our judgment, immaterial to the issues in this case.

The decree of the Circuit Court of Du Page County denying the preference but allowing the claim as a general claim is affirmed.

AFFIRMED.

and effect was considered as a function of the amount of time spent in the laboratory.

It is requested that the following information be furnished to the Bureau of the Census, Washington, D. C., for their use in the preparation of the 1950 Census of the United States.

10-10-68

August 1941

STATE OF ILLINOIS,

SECOND DISTRICT

} ss.

I, JUSTUS L. JOHNSON, Clerk of the Appellate Court, in and for said Second District of the State of Illinois, and the keeper of the Records and Seal thereof, do hereby certify that the foregoing is a true copy of the opinion of the said Appellate Court in the above entitled cause, of record in my office.

In Testimony Whereof, I hereunto set my hand and affix the seal of said Appellate Court, at Ottawa, this _____ day of _____ in the year of our Lord one thousand nine hundred and thirty-_____

Clerk of the Appellate Court

8674

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the second day of May in
the year of our Lord one thousand nine hundred and thirty-three,
within and for the Second District of the State of Illinois:

Present-- The Hon. FRED G. WOLFE, Presiding Justice.

Hon. JAMES S. BALDWIN, Justice.

Hon. THOMAS M. JETT, Justice.

JUSTUS L. JOHNSON, Clerk.

E. J. WELTER, Sheriff.

270 I.A. 638

BE IT REMEMBERED, that afterwards, to-wit: On

MAY 3 1933 the opinion of the Court was filed in the
Clerk's office of said Court, in the words and figures
following, to-wit:

In The
APPELLATE COURT OF ILLINOIS
Second District

February Term A.D. 1933

The First National Bank of
Braidwood, Illinois, a cor-
poration,
Appellant,

vs

The Highway Commissioner of
the Town of Rockville, in
the County of Kankakee and
State of Illinois,
Appellee.

)
Appeal from the
Circuit Court of
Kankakee County.

Baldwin, J.

The appellant (plaintiff below) filed its suit against the appellee (defendant below) on the October Term 1929 of the Circuit Court of Kankakee County to recover a demand due it in the sum of \$2,140.00

The declaration consisted of two counts, by which it was alleged that the defendant has been indebted to one Harvey Gellinger for labor, services and materials and that said Gellinger has assigned his claim therefor to the plaintiff and that the defendant had failed to pay the same. An affidavit of claim was filed by the plaintiff.

IN THE
COURT OF THE DISTRICT OF COLUMBIA
SHERIFF OF THE DISTRICT OF COLUMBIA
JAMES M. HARRIS

James M. Harris
Sheriff of the District of Columbia
District of Columbia

THE DISTRICT OF COLUMBIA
SHERIFF OF THE DISTRICT OF COLUMBIA
JAMES M. HARRIS
District of Columbia

James M. Harris

The undersigned (James M. Harris) Sheriff of the District of Columbia, do hereby certify that the within and foregoing is a true and correct copy of the original of the same as the same is on file in the office of the undersigned.

The undersigned (James M. Harris) Sheriff of the District of Columbia, do hereby certify that the within and foregoing is a true and correct copy of the original of the same as the same is on file in the office of the undersigned.

The defendant filed seven pleas and his affidavit of merits, which it is not necessary to detail herein. Later certain pleadings were filed.

At the May Term 1932 of such court the cause was tried by the court without a jury and at the conclusion thereof the court found the issues for the defendant and entered judgment against the plaintiff for costs. From such judgment this appeal is prosecuted.

Various errors are assigned by the appellant but from the conclusion which we have reached it will not be necessary to discuss each error separately.

The facts in the case as disclosed by the evidence are that Harvey Gellinger was a contractor engaged in the construction of hard roads. On or about July 14, 1932 he entered into a contract with the defendant herein for the construction of certain hard roads therein specified for the total sum of \$3,950.00. He filed his bond and entered upon the performance of the work and fully performed the contract. The work was accepted by the County Superintendent of Highways and from the evidence it appears that the work so performed was entirely satisfactory.

In the payment to such contractor for the construction of these roads the Highway Commissioner issued certain orders or vouchers drawn upon the treasurer of the defendant, all of which were in proper form and some of which have been paid, but there finally remained an indebtedness of \$3,016.00. This was afterward reduced to \$2,150.85. Contractor Gellinger upon receipt of the various orders or vouchers assigned the same to the First National Bank of Braidwood, who is the plaintiff herein and the appellant upon this appeal. It appears that certain

[illegible]

interest has been paid upon the indebtedness remaining due.

The defendant by its various pleas, to which a demurrer was not sustained, contended first, that it was not indebted to the plaintiff; second, the five year statute of limitation was pleaded, and third, that there was no money in defendants treasury or tax levied to pay such warrants at the time the contract herein referred to was made.

It is not denied that the orders or vouchers were issued to Harvey Gallinger as alleged and it is not denied that the work was properly performed by the said Gallinger. In fact, the proof is overwhelming in favor of such proposition and it is proven and not denied that he has not been paid in full for such services.

The evidence herein establishes the fact that the last payment was made to the said Gallinger or his assignee on March 2nd, 1928 and therefore the five year statute of limitation did not expire at the time this suit was filed, even if applicable to this case, but such statute has no application here under the undisputed evidence.

It is next said that there was no money in defendants treasury or taxes levied for the payment of the work required to be done by the said Harvey Gallinger under his contract. Be this as it may, it is certain that neither the Township nor the Highway Commissioner could contract for work, materials or labor to be performed and accept the benefits of it and thereafter evade payment of the obligation by asserting that it had no money with which to pay the obligation. We know of no rule of law which would support any such proposition.

The evidence is conclusive in this case that the Township did receive and accept the service so rendered by Gallinger and for several years recognized this obligation as a valid outstand-

1. The following is a list of the names of the persons who were present at the meeting held on the 1st day of January, 1900, at the residence of the late Mrs. J. W. Smith, in the city of New York, at which time the following resolutions were adopted:

[illegible][illegible][illegible]

The evidence is cumulative in this case and the Government has shown that the evidence is sufficient to establish the guilt of the defendant.

ing obligation and from time to time made payments of principal and interest thereon and we hold that having so recognized the obligation as a valid outstanding obligation (Abdill vs Abdill 293 Ill. 331; O'Hara vs Murphy 198 Ill. 388), the defendant will not now be heard to deny the validity of the obligation.

The judgment of the Circuit Court of Kankakee County is reversed and the cause remanded.

REVERSED AND REMANDED.

[illegible]

STATE OF ILLINOIS, }
SECOND DISTRICT } ss.

I, JUSTUS L. JOHNSON, Clerk of the Appellate Court, in and for said Second District of the State of Illinois, and the keeper of the Records and Seal thereof, do hereby certify that the foregoing is a true copy of the opinion of the said Appellate Court in the above entitled cause, of record in my office.

In Testimony Whereof, I hereunto set my hand and affix the seal of said Appellate Court, at Ottawa, this _____ day of _____ in the year of our Lord one thousand nine hundred and thirty-_____

Clerk of the Appellate Court

8638

AT A TERM OF THE APPELLATE COURT.

Begun and held at Ottawa, on Tuesday, the second day of May in
the year of our Lord one thousand nine hundred and thirty-three,
within and for the Second District of the State of Illinois:

Present-- The Hon. FRED G. WOLFE, Presiding Justice.

Hon. JAMES S. BALDWIN, Justice.

Hon. THOMAS M. JETT, Justice.

JUSTUS L. JOHNSON, Clerk.

E. J. WELTER, Sheriff.

270 I.A. 638⁴

BE IT REMEMBERED, that afterwards, to-wit: On

MAY 3 1933 the opinion of the Court was filed in the

Clerk's office of said Court, in the words and figures
following, to-wit:

7638

General No. 3638

Agenda No. 41

In The
Appellate Court of Illinois
Second District
February Term, A. D. 1933.

Handwritten: 5-1/2-22

Charles A. Fifield,
Appellee,
vs
Curtiss Candy Company, an
Illinois Corporation,
Appellant.

County
Appeal from the
Circuit Court of
Knox County.

Haldwin, J.

On January 15, 1932 the appellee, Charles A. Fifield, purchased from his brother, Roy P. Fifield, who was engaged in business under the name of Galesburg Specialty Company, certain automobiles and trucks. On the same day he sold to his brother, Roy P. Fifield, one Dodge truck and one Buick sedan for the sum of \$2,000.00 upon a conditional sales contract, by the terms of which the title to the property sold was retained in the seller until the amount was paid in full. These two cars were a part of the property which appellee had purchased from his brother on the date above set forth.

The appellant on or about April 13th, 1932 obtained a judgment against the said Roy P. Fifield, trading as Galesburg Specialty Company, in the County Court of Knox County, Illinois,

and thereafter caused to be issued its execution against the said Roy P. Fifield. This execution expired by its own terms on July 13, 1932. However, on the same date a second execution was issued and thereafter on or about August 12, 1932 the sheriff of Knox County purported to make a levy upon the said truck and sedan above described under the second execution as above set forth, as and for the property of the said Roy P. Fifield. Thereupon Charles A. Fifield, in accordance with the statute, served a notice upon the sheriff of Knox County, Illinois, notifying him that he, the said Charles A. Fifield, claimed to own the property so levied upon as the property of the said Roy P. Fifield, and in and by the said notice he also notified the said sheriff that the property was in the possession of the said Roy P. Fifield under leases existing between he, the said Charles A. Fifield, and the said Roy P. Fifield. This notice was filed in the County court and docketed for hearing and the cause was thereafter heard by the court without a jury, who upon the termination of the trial entered judgment against the defendant (appellant) for costs and ordered the property so levied upon to be released and returned to the said Charles A. Fifield, appellee herein. It is from this judgment that this appeal is prosecuted.

The evidence produced upon the trial in this case showed that the said Roy P. Fifield upon his entry in business had not only been loaned money by his brother, Charles A. Fifield, but that the brother had also endorsed certain notes for him at the First Galesburg National Bank.

That on January 15th, above indicated, the said Roy P. Fifield had been unable to pay the indebtedness to his brother and he executed a bill of sale conveying all of the said property therein described to his brother, the appellee herein.

That upon such conveyance being made the appellee then went to the bank and paid off the note upon which he was liable but which was the note of Roy P. Fifield and not of the appellee herein.

That upon the same date he sold to his brother the truck and car above described upon a conditional sales contract and thereafter some time in July of the same year the said Roy P. Fifield having failed to make the payments provided by the said contract, the said Charles A. Fifield repossessed the said cars and each of them.

Thereafter, the two brothers entered into written agreements by which the said appellee allowed his brother to use the said automobiles for a weekly rental under the terms and conditions of written leases introduced in evidence. While these leases were in force the levy herein set forth was made.

The evidence in this case is clear and explicit and there is not the slightest testimony of any sort contradicting or tending to controvert any of the testimony of the appellee and under such state of facts it would seem that there could be but one decision to be made.

It is argued by the appellant that the entire transaction merely amounted to a changing around of the property in question and that the dealing between the two brothers is calculated to create a suspicion and was, in fact, a fraud with a view of undertaking to protect the property of the said Roy P. Fifield.

It is not true that dealings between relatives are necessarily of a suspicious character any more so than dealings between other persons, *Garrett vs Garrett* 343 Ill. 577; *Luthy & Co. vs Paradise* 299 Ill. 380; *Ayres Nat. Bank vs Barber* 287 Ill. 122, but even if it could be said that dealings between

brothers might create a suspicion, certainly the evidence in this case removes all question on this point.

The evidence is absolutely uncontradicted and fully discloses the entire transaction between the brothers and shows that the said appellee herein not only helped his brother in his business and loaned him money but even endorsed a note for him at the bank in the sum of \$2,000.00 and afterwards paid the same. If dealings between brothers creates a suspicion (and we do not so hold) it would be entirely removed by the testimony herein.

It is again contended on behalf of appellant that it was necessary for the conditional sales contract to be acknowledged and recorded in order to have a superior lien over the execution of the appellant. This position is incorrect. It is provided in the Uniform Sales Act of this State that "where there is a contract to sell specific goods, the seller may by the terms of the contract reserve the right of possession of property in the goods until the conditions thereto specified have been fulfilled." To substantially the same effect are the cases of *Motor Acceptance, Inc., vs Weston* 262 Ill. App. 335; *Standard Motor Securities Corporation vs Yates* 257 Ill. App. 394; *Sherer-Gillett Co. vs Long* 318 Ill. 432.

On April 15th, 1933 the appellant herein filed its motion for leave to file additional citations of authority in support of its position. This motion was allowed and the citations filed. We have carefully examined such additional citations and have considered them in connection with this case.

There are other questions raised by the appellant herein but in view of our decision it is wholly unnecessary

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to discuss the question further.

The judgment of the Circuit Court of Knox County is affirmed.

AFFIRMED.

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The amount of his family's loss is
in the neighborhood of \$100,000.

• **Investing**

— 1944 —

STATE OF ILLINOIS,

SECOND DISTRICT

} ss.

I, JUSTUS L. JOHNSON, Clerk of the Appellate Court, in and for said Second District of the State of Illinois, and the keeper of the Records and Seal thereof, do hereby certify that the foregoing is a true copy of the opinion of the said Appellate Court in the above entitled cause, of record in my office.

In Testimony Whereof, I hereunto set my hand and affix the seal of said Appellate Court, at Ottawa, this _____ day of _____ in the year of our Lord one thousand nine hundred and thirty-_____

Clerk of the Appellate Court

General No. 8661 *October Term, 1932* Agenda No. 6

E. Frank Post, Plaintiff-In-Error,

vs.

The People of the State of Illinois, Defendant-in-Error.

Error from Macon.

270 I.A. 638

NIEHAUS, J.

E. Frank Post, the plaintiff in error, was convicted in the Circuit Court of Macon County on an indictment charging him with buying stolen property knowing that the same was stolen; and by the judgment of the Court, was sentenced to pay a fine of \$50.00 and costs; and to imprisonment on the Illinois State Farm for a period of 90 days. A writ of error is prosecuted for reversal of the judgment.

The facts and circumstances concerning the purchase of the stolen property by the plaintiff in error are stated in the brief filed on behalf of the defendant in error, as follows:

"Plaintiff in error, E. Frank Post bought a toilet stool and toilet tank complete on an evening along about the middle of October, A. D. 1931, from one Lester Bundy, a nineteen year old boy, with whom the plaintiff in error had been acquainted for about three years, and who frequented the restaurant owned by the plaintiff in error. Bundy brought the toilet outfit, concealed in a burlap sack, after dark, to plaintiff in error's restaurant. Plaintiff in error went outside the restaurant and was there shown the toilet outfit in the burlap sack. The transaction took place outside the restaurant, and after plaintiff in error had agreed to buy the toilet outfit he had Bundy take the toilet outfit to his home where it was locked up in his garage, and there remained until recovered by the police officers during the latter part of December, 1931."

The plaintiff in error was a witness in his own behalf on the trial and testified in reference to his purchase of the stolen property, as follows:

"I live in Decatur and have been in the restaurant business for 20 years. I am married; had occasion to talk to Mr. Bundy about the outfit that has been introduced in evidence. It was middle or fore part of October; and was along about dark or a little after dark; the lights were on. Had not been personally acquainted with him before that time. Knew who he was when I seen him is all, speaking to him, he was in and out of the place. He came up here and called me out of the building and wanted to know if I would buy a toilet outfit. I said I did if I could buy it right. I looked at the stool and I said, "what do you want for it." He said, "it ought to be worth ten or twelve dollars." I said "it wouldn't be to me," "I will give you \$8.00 for it, if you want to take it down to my house." That was all the conversation I had with him. The first thing I asked him was "where did you get it" and he said, "I have been helping a man wreck a building at Jasper or Wood or something like that, and he gave me that for my part of the work."

The plaintiff in error after making his statement about the circumstances of the purchase, was asked the following questions by his counsel to which objections were sustained:

"Q. At that time did you have occasion to use a stool of this kind?

Q. State whether or not you had any reason or purpose for wanting to buy it?

Q. State what you expected to do with this if you bought it?

Q. You may state if you had any purpose in buying it?

Q. You may state if you had any place where you desired to put this?

Q. Now when you bought this, did you have any definite use in mind for this plumbing outfit?

In reference to the last question, counsel for plaintiff in error suggested to the Court that it might be answered yes or no, and thereupon the Court ruled, that he might answer; and the plaintiff in error answered: "Yes sir." Then he was asked the following question:

"You may state what that use was."

To which an objection was sustained.

The foregoing questions were obviously put to the witness

to elicit from him the purpose and intention which were in his mind, in buying the property referred to. The intent and motive of the plaintiff in error in buying the property are competent and material matters of evidence to be considered by the jury in the determination of the question of guilty knowledge on the part of the plaintiff in error concerning property stolen. He should have been allowed to answer the questions as proper evidence for the consideration of the jury. *Wohlford vs. People*, 148 Ill. 296. *People vs. Spranger*, 314 Ill. 602.

To sustain a conviction for receiving stolen property, facts and circumstances must be proved sufficient to create in the mind of the accused the belief that the property was stolen. *People vs. Kohn*, 290 Ill. 410; *People vs. Wagner*, 333 Ill. 603.

Another error assigned, concerns the rulings of the Court in sustaining objections to certain questions propounded by plaintiff in error's counsel to show the plaintiff in error's general reputation as a law abiding citizen in the neighborhood or community where he resided. One of the witnesses for this purpose was J. S. McClelland, who testified that he was then in the insurance and real estate business in Decatur; and had been for 4 years past; and before that, he had been in the wholesale grocery business for about 33 years; that he was acquainted with the plaintiff in error; and had known him 10 or 15 years; that his acquaintance with him was of a business nature; and as long as he had been in business; and that he had done business with him at his place of business and at his own. Thereupon this question was asked the witness:

"Did you become acquainted with the defendant's general reputation in the community where he resides and among those people with whom he associates, as being a law abiding citizen prior to October 1, 1931?"

A general objection was made to the question which the Court sustained.

Another witness called was J. A. Zimmer who testified, that he had been with the National Cash Register Co. for 29 years; and had resided in Decatur for 18 years; that he had known the

plaintiff in error 15 years in a business way. Thereupon substantially the same question was put to the witness concerning the general reputation of the plaintiff in error; but on objection, the witness was not allowed to answer.

Another witness called concerning the same matter was Lamont Fisher. He testified, that he had been in the lumber business in Decatur for 25 years, about 6 or 8 blocks south of plaintiff in error's place of business; had known him for 15 or 20 years in a business way and in the neighborhood where he resided; and was acquainted with the neighborhood where plaintiff in error resided. Thereupon substantially the same question was asked the witness concerning the general reputation of the plaintiff in error in the community where he resided; and among those with whom he associated, as to his being a law abiding citizen prior to October 1, 1931; but an objection was sustained to it and the evidence was not admitted.

A number of other witnesses residing in Decatur and doing business there, were called to testify concerning the general reputation of the plaintiff in error as a law abiding citizen; but on the objection of the defendant in error, the evidence was not admitted by the trial court. The record discloses, that in nearly every instance the preliminary proof was sufficient as a proper foundation for the introduction and admission of the evidence referred to; and we are of opinion therefore, that in its rulings, in sustaining objections to its introduction, the trial court was in error. It is well settled, that in cases of this character where proof of guilty knowledge is a necessary element in constituting the crime, proof of the good character of the accused is competent evidence. *Jupitz vs. People*, 34 Ill. 516; *People vs. Koloski*, 309 Ill. 468; *Brown vs. Leuhrs*, 1 Ill. App. 74; *Peters vs. Borneau*, 22 Ill. App. 117.

For the errors indicated, the judgment is reversed and the cause remanded.

Adm. & Prob. Div.

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GENERAL NO. 8665

JANUARY TERM, A. D. 1933.

AGENDA NO. 1

GEORGE A. RAFFERTY, Administrator
of the estate of ROBERT L.
CUNNINGHAM, Deceased,

Plaintiff in Error,

vs.

JOHN M. GOEBELT,

Defendant in Error.

Error to

Circuit Court

Greene County.

270 I.A. 639¹

ELDREDGE, P. J.

This cause originated in the County Court of Greene County by the filing of a claim by defendant in error, John M. Goebelt, in the estate of Robert L. Cunningham, deceased, of which plaintiff in error is administrator. The claim is based upon a note for the principle sum of \$5,495.90 executed by Fred Cunningham and later by his father Robert L. Cunningham on which it was claimed that there was an unpaid balance due for \$3,093.81. On a hearing in the County Court the claim was allowed in the amount of \$3,130.50. An appeal was taken to the Circuit Court where a jury was waived and the trial had before the Court and judgment was entered for claimant for \$3,737.06 which included interest on the note to the date of the judgment.

The note is as follows:-

"\$5495.90

June 1, 1923.

Five years after date for value received I promise to pay to the order of John M. Goebelt Fifty-Four Hundred Ninety-five and 90/100 Dollars at the Farmers State Bank of Greenfield, Illinois, with interest at 7 per cent per annum after date until paid. Payments made at any time to stop interest on the payments.

And to secure the payment of said amount I hereby authorize, irrevocably, any attorney of any Court of Record to appear for me in such Court, in term time or vacation, at any time and confess a judgment without process in favor of the holder of this note, for such amount as may appear to be unpaid thereon, together with costs and \$49.00 dollars attorneys fees, and to waive and release all errors which may intervene in any such proceeding, and consent to immediate execution upon said judgment, hereby ratifying and confirming all that my said attorney may do by virtue hereof. Interest payable semi-annually.

Fred L. Cunningham
R. L. Cunningham."

It was endorsed on the back as follows:- "In consideration of the signing of this note as surety by R. L. Cunningham, the payee J. M. Goebelt hereby agrees never to attempt collection in any way of this obligation during the lifetime of the surety, the said R. L. Cunningham.

J. M. Goebelt.

197.36 Interest paid to Dec. 1, 1923.
1924. April 2--by inventory of stock \$2,917.11
Interest paid to 4/2 1924
Principal due \$2578.79."

On June 1, 1923 defendant in error ran a combination store and restaurant in the City of Greenfield, Illinois. He was the son-in-law of Robert L. Cunningham, deceased, and also a brother-in-law of Fred Cunningham. He sold the store and restaurant on that date to Fred Cunningham who executed the note in question as payment therefor. Fred Cunningham took possession thereof and operated the business for about eleven months, when, on March 30, he abandoned the business, left the town and wrote to defendant in error in substance that he had made a failure of

the business and for defendant in error to take it and do the best he could with it. Defendant in error appointed some appraisors to make an inventory of the stock which was left in the store and credited the note with the amount thereof, also with \$75.91 cash left in the store and paid accounts left unpaid of \$509.14, leaving a balance due on the note of \$2,578.79. The note in question had been left by defendant in error for safekeeping in the First National Bank of Greenfield. Shortly after Fred Cunningham had abandoned the store and left Greenfield, Robert L. Cunningham went to the Bank and asked if a note had been left there of Fred Cunningham payable to defendant in error and stated he wanted to sign it, that Fred had run away and he felt that he had not done right, and, according to the testimony of the cashier of the Bank, he would not sign the note until he knew that the endorsement was on the note. The cashier of the Bank testified that at the time he signed the note Robert L. Cunningham knew and understood perfectly what he was doing and knew of the endorsement upon the note.

It is claimed by plaintiff in error that Robert L. Cunningham on account of his advanced age and ill health was not mentally competent to transact business, also that defendant in error threatened to have Fred Cunningham arrested and placed in

jail unless the note was paid and that such threats, owing to the enfeebled mental condition of Robert L. Cunningham, amounted to duress. The evidence is conflicting and as the trial was before the Court without a jury full faith and credit must be given to the findings of the Court on all questions of fact unless it is manifestly against the weight of the evidence. The evidence in this case is sufficient to sustain the trial court in its finding on the facts and consequently we would not be justified in reversing the judgment upon that ground. No propositions of law were offered by plaintiff in error and consequently no question of law were preserved in the record for our determination. In the case of

Swain vs. First National Bank, 201 Ill. 416 it was held:- "Where there is a trial before the court without a jury, in order to present a question of law to this court the party should submit propositions of law to the trial court, as provided for in section 41 of the Practice act. (First Nat. Bank of Michigan City v. Haskell, 124 Ill. 587; Northwestern Mutual Aid Ass. v. Hall, 118 id. 169). As no propositions of law were submitted on the trial below, no question of law arises here upon the record; and all the questions of fact are settled by the judgment of the Appellate Court." To the same effect are Mutual Pro. League vs. McKee, 223

Ill. 364; Jacobson vs. Liverpool, etc. Ins. Co., 231 Ill. 61;

Wight vs. Chicago, 234 Ill. 83; Knox Engineering Co. vs. R.I.S.

Ry. Co., 264 Ill. 198; Overland Motor Co. vs. Tennant, 195 Ill.

App. 6.

The judgment of the Circuit Court is affirmed.

THE UNITED STATES OF AMERICA

DO hereby certify that

the following is a true and correct copy of the

original as the same appears in the records of the

Department of the Interior

at Washington, D. C.

in the office of the

Assistant Secretary

of the Interior

on this day of

190

at Washington, D. C.

Witness my hand and the seal of the Department of the Interior

this day of

190

at Washington, D. C.

Assistant Secretary

of the Interior

DO hereby certify that

the following is a true and correct copy of the

original as the same appears in the records of the

Department of the Interior

at Washington, D. C.

Abstract
1932

GENERAL NO. 8732

JANUARY TERM, A.D.1933

AGENDA NO. 13

LOUISE BROWN,

Defendant in Error,

vs.

ROBERT BROWN,

Plaintiff in Error,

Error to
Circuit Court
Clark County.

270 I.A. 639²

ELDREDGE, P.J.

Louise Brown, defendant in error, filed her bill in the Circuit Court of Clark County against her husband Robert Brown, plaintiff in error, for separate maintenance. Plaintiff in error filed his cross bill in said cause for divorce. The Court granted a decree in favor of defendant in error upon her bill for separate maintenance and ordered, "That the defendant, Robert Brown, be denied the relief prayed for in his cross bill for divorce." No further order was made in regard to the cross bill. Sec. 2, Chap. 68, Rev. Stat. provides that a suit for separate maintenance must be instituted in the County where the husband resides, and this limitation appears to be jurisdictional. Bleckenberg vs. Bleckenberg, 232 Ill. 120; Plotnisky vs. Plotnisky, 241 Ill. App. 166; Bayer vs. Bayer, 234 Ill. App. 323; Briney vs. Briney, 223 Ill. App. 119. There is no averment in the original bill as to the residence of plaintiff in error,

Abstract
Case No. 270 I.A. 639 - 11/11/1933
Researcher - 11/11/1933

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General Number 8706

JANUARY TERM, A.D. 1933.

Agenda No. 2.

CLINTON P. HEADLEY,
Plaintiff in Error,

v.

FRANK S. SCOTT and C. F. SCOTT,
Defendants in Error.

)
) Error to the
)
) Circuit Court of
)
) Greene County.

270 I.A. 639³

Shurtleff, J:

This is an action brought by plaintiff in error against defendant in error in trespass on the case for injuries suffered by plaintiff in error in an automobile accident, in which plaintiff in error claims to have been struck by defendant in error's car. The accident in question occurred on Lindell boulevard, a public thoroughfare of the City of St. Louis and State of Missouri, at about midnight on December 27, 1927, or a few moments thereafter, on the morning on the 28th. The declaration is in five counts, the first of which charged that defendant in error was driving his car on the left hand side of the street. In the second count of the declaration plaintiff in error sets out a law of the State of Missouri as follows: "Every person operating a motor vehicle on the highways of this state shall drive the same in a careful and prudent manner, and shall exercise the highest degree of care, and at a rate of speed so as not to endanger the property of another or the life or limb of any person, provided that a rate of speed in excess of twenty-five miles an hour for a distance of one-half mile shall be considered as evidence, presumptive, but not conclusive of driving at a rate of speed which is not careful and prudent, but the burden of proof shall continue to be on the prosecution to show by competent evidence that at the time and place charged the operator was driving

at a rate of speed which was not careful and prudent, considering the time of day, the amount of vehicular and pedestrian traffic, condition of the highway and the location with reference to intersecting highways, curves, residences or schools."

The third count charges that defendant in error failed to sound his horn or to give any other warning of his approach, and the fourth count charges defendant in error with negligence in failing to slacken, swerve or stop his car, although he could, in the exercise of ordinary care, have done so without injury to himself or the occupants of the car so as to avoid striking the appellant, and with negligently failing to have his car under such control so that he could, in the exercise of such ordinary care, have slackened, swerved or stopped the same so as to avoid the accident.

The fifth count sets up the ordinance of the City of St. Louis then in force and effect prescribing, among other things, that the driver of an automobile shall keep his car as near as may be reasonably possible to the right curb of the street upon which he is driving, and charges negligence against the appellee in failing to keep his car upon the right side of Lindell boulevard.

There was a verdict and judgment for defendant in error, and plaintiff in error, plaintiff below, has brought the record by writ of error to this court for review.

Lindell Boulevard is a paved street in St. Louis, sixty feet in width, running in a generally easterly and westerly direction. The point at which the accident occurred is at the middle of a long block, covering two ordinary blocks. The point in question is where the 4600 series of house numbers begins on the boulevard. The street was well lighted by electric lights. On the south side of it, opposite this point, is situated the building in which the Woman's Club of St. Louis has its headquarters.

On the night in question plaintiff in error and his wife had attended an entertainment at the Woman's Club and Plaintiff in Error had crossed the street after the entertainment was over to procure an umbrella and shawl or wrap for his wife from his car, which was parked on the north side of the street. After securing these things he walked into the street, passed the line of parked automobiles and stopped to observe the traffic. From this point, he testified, he could see about two hundred feet in both directions. The night was rainy, there being a fine drizzle or light rain falling. Plaintiff in error after waiting for one car to pass, and seeing no others close to him, began walking across the street.

Plaintiff in error testified that as he went across the street he was looking both ways; that he was looking east; that you cannot confine your looks to one direction; that he had to look to the east and west until he thought the traffic was such that he could get across the street, and that he kept on looking. He testified that the first he observed the car approaching was the reflection of the head lights from the pavement and that he saw that from under the umbrella. He also testified that he did not know whether he had the umbrella up or not, that he was not quite sure that the reason he did not see the car was because he had the umbrella down over his head. The evidence also showed that the plaintiff in error was wearing a dark overcoat, and both defendant in error and his companion, J. C. Davis, testified that plaintiff in error had the umbrella open and down close to his head. Defendant in error also testified that the only thing that he could see was the black umbrella and the black overcoat. It is true that the plaintiff in error testified he was carrying a shawl on his arm, but he did not testify that it was on an arm where it could be seen by the driver of the car nor whether it was hidden from the driver by his body and by his umbrella, and therefore the Court subsequently excluded the evidence as to the shawl because it was irrelevant.

Plaintiff in error testified that when he was five or six feet south of the center line of the Boulevard he saw defendant's automobile approaching, but the weight of the evidence is against him in this regard because his own witness, Judge M. R. Stahl, testified that Mr. Headley after the accident was lying four or five feet north of the center of the street, and that he had been thrown straight forward to the west, while the defendant in error and his companion both testified that Headley was six or seven feet north of the center of the street when he was struck, and that at no time did defendant in error drive on the south side of the street in that block, and that they were driving about six feet out from the parked cars along the curb. That Headley, after he was struck, was thrown toward the left or south.

The evidence also showed, as stated by plaintiff in error, that it was the left front fender of the car that struck him. The evidence showed that defendant in error stopped the car within twenty or twenty-five feet of the point of the accident and then drove to the curb and went back and picked up plaintiff in error. The evidence also showed that plaintiff in error came out of the darkness into the light in front of defendant in error's car at a run or trot. The evidence also showed that defendant in error was, following directly behind another car, and according to plaintiff in error's own statement he waited until he saw a car pass and then started across.

Plaintiff in error does not claim that the verdict in the case at bar was against the manifest weight of the testimony and could not well assign such error upon the proofs, as we have read them.

Plaintiff in error does assign error upon the Court giving defendant in error's instructions 2 $\frac{1}{2}$ to 13, inclusive, as follows:

2 $\frac{1}{2}$. The Court instructs the jury that if you believe from

the evidence that the alleged injury was accidental, and that neither the plaintiff nor the defendants were negligent, then you should find the defendants not guilty.

3. The law places upon all adult persons the duty of exercising reasonable care, to avoid injury to themselves, and even though the jury should believe from the evidence that the driver of the automobile was negligent, and that the plaintiff was injured, still, if the jury further believe from the evidence that the injury to plaintiff could and would have been avoided by the exercise of reasonable care, on his part to avoid or prevent the collision and injury, and that, he, the plaintiff, did not exercise such care, then there could be no recovery in this case.

4. If you believe from the evidence that both the plaintiff and the defendant Frank E. Scott were guilty of negligence which concurred to cause the collision and injury in question, then you should find the defendants not guilty.

5. If you believe from the evidence that the plaintiff at the time of his injury, or immediately prior thereto, omitted to do for his own safety that which an ordinarily careful person under like circumstances would have done, and that in consequence of such omission, the plaintiff was injured, then the law is that the plaintiff cannot recover.

6. The exercise of ordinary care, for one's own safety, such as is required in this case, is the exercise of that care which every person of common prudence bestows upon his own affairs or concerns, and the ordinary care, which reason and law require a person to exercise for his own safety must be proportionate to the danger, if any, and exercised with reference to the situation and position in which the person finds himself.

7. The Court instructs the jury with reference to the question of speed that even if you believe from the evidence that at the

time of the accident in question the automobile was being operated at a speed greater than twenty-five miles an hour, yet the burden of proof is still on the plaintiff to show that at the time and place in question, the driver was driving at a rate of speed which was not careful and prudent, considering the time of day, the amount of vehicular and pedestrian traffic, condition of the highway and the location with reference to intersecting highways or residences; and also to prove that he himself was in the exercise of due care and caution for his own safety.

8. If you believe that the plaintiff has failed to prove by the preponderance of the evidence that the defendant C. F. Scott, at and before the time of the accident in question, kept and maintained an automobile for the general use and pleasure of himself and family, and that the defendant Frank S. Scott was then a member of the family of the said C. F. Scott, and that the said Frank S. Scott had the permissive use of the automobile from the said C. F. Scott, at the time of the accident, then the plaintiff cannot recover as against the said C. F. Scott.

9. These instructions constitute a statement of the law applicable to this case, and it is your duty to obey them and to follow the law thus given you by the Court.

10. The jury are further instructed that neither by these instructions, nor by any words uttered or remarks made by the Court during this trial, does or did the Court intimate or mean to give, or to be understood as giving an opinion as to what the proof is or what it is not, or what the facts are in this case, or what are not the facts therein. It is to the jury to find and determine the facts and this you must do from the evidence, under the law, and having done so, then apply to them the law as stated in these instructions. The instructions given to the jury are and constitute one connected series,

and should be so regarded and treated by the jury; that is to say, the jury should apply them to the facts as a whole, and not detach or separate any one instruction from any or either of the others.

11. It is not sufficient to entitle the plaintiff to recover in this case, to show a negligent breach of duty on the part of the defendants, but it devolves upon the plaintiff to show farther that such breach of duty was the proximate or immediate cause of the injury to the plaintiff; that in no case can a recovery be had for a negligent breach of duty, unless the evidence shows that such negligent breach of duty, if any, was the proximate cause of the injury occurring.

12. If you believe from the evidence that the alleged injury was accidental, and that neither the plaintiff nor the defendants were negligent, then you should find the defendants not guilty.

13. The Court instructs the jury that the burden of proof is not upon the defendants to show that they are not guilty of the acts charged against them in plaintiff's declaration, but that the burden of proof is upon the plaintiff to prove that the defendants are guilty.

We have examined all of these instructions given in connection with the proofs in the case, and we cannot say that they constitute error.

As to instruction number seven, in Harris v. Piggly Wiggly Stores, supra, at page 399, the Court, with regard to an instruction telling the jury that exceeding the statutory speed limit was prima facie evidence of negligence, said: "In Stansfield v. Wood, 231 Ill. App. 586, opinion by Mr. Justice Heard, the giving of this instruction was held to be erroneous. It was also criticised in Johnson v. Pendergast, 308 Ill. 255, on the ground that it was doubtful whether the ordinary juror would understand the legal meaning of the term prima facie and that the instruction was equivalent to

advising the jury that if defendant violated the Statute, negligence was proved."

In Stanfield v. Wood, supra, at page 591, the Court says:

"It does not follow that because a rate of speed in miles is stated in the Statute to be prima facie, unreasonable and dangerous that such rate of speed is in fact unreasonable and dangerous in every case, or that a lesser rate of speed in every case is reasonable and not dangerous."

Instruction number twelve in this case was approved in Webster Mfg. Co. v. Nisbett, 87 Ill. App. 551, 553. This instruction has never been criticised and the only similar instruction that has been criticised has been one where the element that neither plaintiff nor defendant were negligent had been omitted. The Court was certainly not permitted to say as a matter of law that the defendant was guilty of negligence. If it was the plaintiff that was guilty of negligence, then the instruction could not have been prejudicial to plaintiff. The jury were definitely instructed that for that instruction to be effective it must appear that neither the plaintiff nor defendant were negligent, and that was certainly a correct proposition of law.

It is quite apparent that instructions 2½ and 12 were duplicated, and not by fault of defendant in error, as shown by the numbering of the first. The instructions on contributory negligence were all on different phases of that subject. Instruction number three was as to the effect of contributory negligence; instruction number five related to the omission of care as negligence; instruction number six defined what ordinary care was. Those three were the only instructions really bearing on the question of contributory negligence. Instruction number four merely stated what the effect was when both parties were guilty of negligence. It cannot be said that these instructions covered the same matter, differing only in verbiage.

There was no error in instruction number six. It was held in Dickson v. Swift Company, 238 Ill. 62, also cited by plaintiff in error, at page 66: "What is ordinary care depends upon the circumstances of the particular case, as stated in the instruction. When the circumstances are such that an ordinarily careful and prudent person would take greater precautions for his own safety than under less threatening circumstances, the greater degree of caution would be ordinary care. (West Chicago St. Ry. Co. v. Manning, 170 Ill. 417.) While the circumstances in which a person is placed may differ and require the doing of different things for his personal safety, and call for effort and circumspection, proportionate to the known danger, the care demanded in such as a person of ordinary prudence would usually exercise under the same and similar circumstances and is nothing but ordinary care after all." That is the doctrine that was presented to the jury by the instruction in question.

No proofs having been submitted tending to show that defendant in error could have seen the shawl carried by plaintiff in error, it was not error to strike the proof as to the shawl from the record.

Finding no error in this record warranting a reversal of this judgment, the verdict and judgment of Greene County Circuit Court are affirmed.

AFFIRMED.

Robert Markwell,

Appellee,

v.

Marcella Dolan,

Appellant

270 I.A. 639^f

Appeal from the

Circuit Court of

Vermilion County.

Shurtleff, J:

This is an action in tort to recover damages for personal injury and property damage which resulted from a collision of two automobiles on a highway between Danville and Catlin in Vermilion County, about midnight on December 19, 1931.

The appellee, Robert Markwell, had been visiting in Catlin and on his way home was riding in his automobile, driven by his wife, in a northeasterly direction, coming toward Danville.

The appellant, Marcella Dolan, had attended a show in Danville and was driving a car owned by her father in a southwesterly direction toward Catlin, where she lived.

The road runs diagonally with the points of the compass from northeast to southwest. Traveling toward Danville, the direction is northeast, and traveling toward Catlin, one drives southwest.

At a point on the highway a short distance north of Catlin the cars collided; that the accident occurred on a foggy night near midnight.

The declaration consists of three counts, charging in the first general negligence. In the second the negligence charged is

driving without lights visible two hundred feet in advance, and in the third a failure to seasonably turn to the right of the center of the roadway.

As originally begun, the suit was brought against Marcella Dolan, the driver, and also against her father, William Dolan, the owner of the car.

The latter pleaded two special pleas denying the agency of the daughter. It being shown that she was upon an errand of her own, at the close of plaintiff's evidence the trial court directed a verdict in his favor. The case then proceeded against Marcella, and the jury brought in a verdict against her for \$3,350, upon which judgment was entered. Appellant has brought the record to this court by appeal for review.

A motion for a directed verdict was made on her behalf, accompanied by a proper instruction, at the close of plaintiff's case and renewed at the close of all the evidence. A motion for a new trial was made, and exceptions were duly taken to the rulings of the court and the entry of judgment.

In this court the issues are that the verdict is contrary to the weight of the evidence; that the court should have directed a verdict for the defendant because of contributory negligence, and also that the trial court erred in giving instructions to the jury offered by appellee.

The evidence in the case showed that the Markwells had been visiting in Catlin and started toward their home near Danville. Their car was an Essex Super-Six. The direction in which they traveled was northeast. Mrs. Markwell was driving. The fog is described as being very heavy at the point of collision. Vision was difficult, and at appellee's suggestion, his wife turned her lights from bright to dim

so that they could follow the pavement.

Markwell was the only witness for the appellee as to what occurred when the collision resulted.

He says the lights on his car were dimmed, but were burning when the accident happened. He also says that his car was being driven at ten miles an hour with the two right hand wheels on the gravel or cinder shoulder of the highway, and that these two wheels were about two and one-half or three feet beyond the right hand edge of the brick pavement in the direction he was going, and that his car was in that position at the instant of the impact. He says when he first saw it, the Dolan car was ten feet away.

The Dolan car was a Buick sedan and there were three persons in it, all on the front seat. They were traveling about twenty miles an hour.

Several heavy pockets of fog were encountered, and they found that they could better follow the road without lights, and accordingly, when this last heavy fog was encountered, Marcella switched off the lights and had traveled a short interval, which she describes as about two minutes, in that way, when the collision occurred. The Markwell car was visible only a few feet away.

The persons in the Dolan car were Marcella, sitting behind the wheel, on the left; the mother sat on the right with the window partly down and watched the edge of the pavement on the right hand side in the direction they were traveling, southwest, and in the middle of the seat sat Miss Lucy Rehaur.

As to the accident, appellee testified: "I opened the window because it was hot in the car, and my wife opened hers. It was hot on the 19th of December. It was warm in the car and I lowered my window and she lowered hers.

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"The dashlight on the inside of the car was on all the time. I told my wife to switch the bright lights off right after we left Dixon's Lane. Had not traveled over three hundred feet with the dim lights on. She switched the brights out onto the dimmers and I looked down and tucked my overcoat and drew it over my lap and looked at the speedometer to see how fast she was driving and then straightened up in my seat and looked out the windshield and when I looked up I seen the car right on us. I could see ten or fifteen feet ahead of the car as we traveled from the village up to the place of the accident. The night was so dark and the fog so heavy that whether we had bright or dim lights the furthest I could see was ten or fifteen feet ahead. I don't know whether I could see better with the brights or the dimmers on. We could see about the same distance with the dimmers. They are located in the headlights and a part of them. The car had a switch to change the power of the headlights. They were not little lights at the side just in front of the windshield. They were in one globe in the front of the car; didn't see the car that was approaching until it was about ten feet in front of us.

"After the collision I am not able to give any information as to where I lit or where the car stopped. The car I saw approaching us was part on the pavement. Still it hit our car on the right hand side, and the damage to our car is on the right hand side. I have seen the car since then."

The witness, Lantern, testified to the position of the cars after the accident. He testified: "When we got there, the Dolan car was facing northwest at a slight angle. The pavement runs in a southwesterly direction and the Dolan car was northwest at what I imagine would be a right angle to the pavement. The two front and right rear wheels were on the pavement and the left rear wheel off. The Essex was on the north side of the pavement facing southeast with three wheels, I am positive, off, and I can't say if the right front

wheel was off the pavement on the north side.

"The two cars were facing each other except that they offset one another a little. The two cars, if they could run, could be driven past one another about a foot or two apart. The Buick would have been on the south side of the Essex. The two cars were about six or eight feet apart."

Appellee's car was hit on the right hand side, the right front wheel broken off and the radiator pushed back.

Lucy Rohour, who was riding in the car with appellant testified: "The night was very foggy. The fog was in pockets. The first pocket was near the County Farm, and then it thinned out a little, and just before the wreck, we were in the worst one. Mrs. Dolan had the window open and was watching along the edge of the pavement to see that we didn't get off. Marcella had the window partly down on her side.

"I was looking straight ahead and the first thing I knew was the crash. I did not see any obstacle in front of me. There was no light at all on the Markwell car. Immediately preceding and at the time of the collision the Dolan car was right in the middle of the pavement, and after the collision, when they came to rest, the Dolan car was headed almost west with the left hind wheel off, and the Markwell car was all off on the shoulder or gravel on the right.

"On the way back we ran into pockets of fog. The fog did not entirely lift, but was heavier at some places than others. Couldn't see very well with the lights on where the fog had lifted. There we could see about ten feet.

"These fog pockets were a short distance apart. The first was near Sifton and then one near the County Home. We had been in this pocket about two minutes before the accident. Marcella slowed down

when she left this. She was going about twenty miles an hour. We were still in the second pocket when we had the wreck.

"We couldn't see ahead of the car with the lights on. With the lights off, we could see the road. It looked like a white ribbon. The color of the pavement and the shoulder on the side are not the same. I could just see the road.

"The place where the accident happened is about a mile from the city limits of Catlin. Our windshield was not covered with water or fog or mist. I did not see any lights ahead of us until the time of the accident. I was looking right down the road and didn't see a sign of a light. I think I could have seen lights, if there had been any. I think I might have been able to see bright lights on an automobile coming in my direction about one hundred yards."

This testimony was fully corroborated by Mrs. William Dolan, who was riding with her daughter. Appellant testified: "We were on our way home in the car that night. The fog was in pockets and was very heavy. In the dense pockets we could see just a very few feet with the lights on. Where it wasn't so dense, we could see six or eight feet. After we passed through a heavy pocket on the other side of the County Home, the fog lifted and I seemed to be able to see better, but by the time we got to the Valentine home the fog grew so heavy I couldn't see anything, and the lights on my car seemed to throw a glare in my face, and so I turned them off. They were off at the time of the collision.

"The Markwell car had no lights on at the time of the collision. I was driving right down the middle of the brick pavement. Just a second before the crash, I saw this black obstacle looming up in front of me. I did not know what it was at that time. As soon as I saw it, I did not have time to yell or warn anybody, and I raised my foot to

jam on the brakes, but I couldn't say whether I did or not. It all came so quickly. This car has four wheel brakes which are operated by a foot lever. I did nothing to disconnect the gear. None of us were thrown out of the car.

"I observed our car with reference to the pavement and could see that the left hind wheel of our car was barely off the pavement with the other three wheels on. The Markwell car was in front of me with their three wheels off of the pavement and it seemed the right front wheel was just barely on the pavement.

"We went through more than one pocket of fog after we left Tilton. There were three fogs, two very dense and the other one light. The second one was heavy, just after we left the County Farm, and the third one was where the accident occurred. I think the third one began between a quarter and half a mile from the place of the accident.

"I think we were driving between twenty and twenty-five miles an hour. I could see with the lights out between eight and ten feet. With the lights turned on, I could hardly see at all. I could see lights ahead of me about fifty feet. Just after we left Tilton, we passed the last light.

"At the place of the accident the pavement is ten feet. I could see the left hand and right hand side of the pavement. My window was partly down and I looked out occasionally. I kept my eyes more on the center of the pavement. My windshield was dry. The dark object I saw in front of me was over to my right. I couldn't see whether it was off the pavement. I cannot say whether my car stopped immediately. I was stunned.

"I did have a talk with Mrs. Markwell and she told me how she was. Mr. Markwell did not say anything to me, but he kept wiping his

head and moaning and said his right side seemed to hurt him. There was blood running down his face.

"I had a bad laceration on my wrist and a scar on my face and my body was bruised. I went to a doctor in Catlin and then went home."

There was no damage done to the left hand side of either car. The witness Lantern, described the glass on the pavement after the accident, stating: "The glass I mentioned was scattered all around. There wasn't any accumulation at any particular point. The biggest portion was in the center of the pavement and the north shoulder to the right side of the pavement,--some near the Dolan car and some near the Markwell car and some between the two cars."

The road at the point of the accident is described as a brick pavement ten feet in width, running northeast from the city limits of Catlin, level, and in the center of the road as originally laid out, with shoulders on the northwest, ten feet in width of gravel and almost level with the pavement, having a ditch on the northwest edge of the shoulder about eighteen inches deep. On the southeast of the pavement the shoulder consists of gravel extending two and one-half or three feet and the balance of cinders of a total width of about sixteen feet sloping to a ditch eleven inches deep. The place of the accident was six-tenths of a mile from the east city limits of Catlin. The shoulders were slightly lower than the brick. At the place of the accident the road is straight and runs almost due southwest to northeast.

Appellee's fourth instruction to the jury, strenuously objected to by appellant and assigned as error is as follows: "The court instructs you that the statute of this state provides as follows: When upon any public highway in this state, during the period from one hour after sunset to sunrise, every motor vehicle shall carry two lighted lamps showing white lights, or lights of a yellow or amber tint,

visible at least two hundred (200) feet in the direction toward which each motor vehicle is proceeding." This instruction, in connection with appellee's testimony that "The night was so dark and the fog so heavy that whether we had bright or dim lights, the furthest I could see was ten or fifteen feet ahead." demonstrates that the injury was purely accidental, or otherwise that appellee was guilty of contributory negligence. It cannot be presumed that appellant, on the night in question, could any better see to drive than appellee or his driver.

It is assigned as error that appellee's first instruction, which directed a verdict, in no manner mentioned the subject of due care on the part of appellee's driver, and appellee's second instruction, which also directed a verdict, did not mention the subject of due care on the part of appellee or his driver. This was error. The ~~appellee's~~ fourth instruction in this case was also an error.

Upon all the proofs submitted regarding the injury caused to the respective cars and their positions, before and after the accident, we are of the opinion that the verdict is against the manifest weight of the evidence.

Accordingly, the verdict and judgment of the Circuit Court of Vermilion County are reversed and the cause remanded.

REVERSED AND REMANDED.

